

104
**ETHICS IN GOVERNMENT AND LOBBYING REFORM
PROPOSALS**

Y 4. J 89/1:104/61

Ethics in Government and Lobbying R...

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION

OF THE

COMMITTEE ON THE JUDICIARY

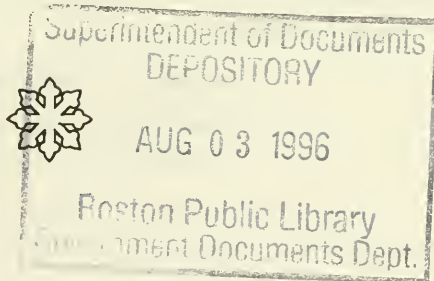
HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTH CONGRESS

SECOND SESSION

MARCH 22, 1996

Serial No. 61



Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE

25-017 CC

WASHINGTON : 1996

For sale by the U.S. Government Printing Office
Superintendent of Documents, Congressional Sales Office, Washington, DC 20402

ISBN 0-16-052787-2

ETHICS IN GOVERNMENT AND LOBBYING REFORM PROPOSALS

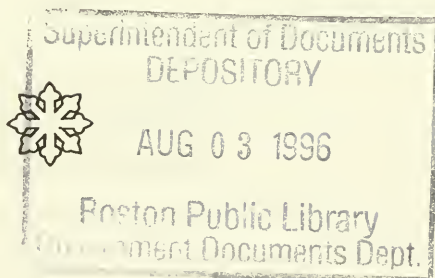
Y 4. J 89/1:104/61

Ethics in Government and Lobbying R...

HEARING
BEFORE THE
SUBCOMMITTEE ON THE CONSTITUTION
OF THE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES
ONE HUNDRED FOURTH CONGRESS
SECOND SESSION

MARCH 22, 1996

Serial No. 61



Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1996

25-017 CC

For sale by the U.S. Government Printing Office
Superintendent of Documents, Congressional Sales Office, Washington, DC 20402
ISBN 0-16-052787-2

COMMITTEE ON THE JUDICIARY

HENRY J. HYDE, Illinois, *Chairman*

CARLOS J. MOORHEAD, California
F. JAMES SENSENBRENNER, JR.,
 Wisconsin
BILL MCCOLLUM, Florida
GEORGE W. GEKAS, Pennsylvania
HOWARD COBLE, North Carolina
LAMAR SMITH, Texas
STEVEN SCHIFF, New Mexico
ELTON GALLEGLY, California
CHARLES T. CANADY, Florida
BOB INGLIS, South Carolina
BOB GOODLATTE, Virginia
STEPHEN E. BUYER, Indiana
MARTIN R. HOKE, Ohio
SONNY BONO, California
FRED HEINEMAN, North Carolina
ED BRYANT, Tennessee
STEVE CHABOT, Ohio
MICHAEL PATRICK FLANAGAN, Illinois
BOB BARR, Georgia

JOHN CONYERS, JR., Michigan
PATRICIA SCHROEDER, Colorado
BARNEY FRANK, Massachusetts
CHARLES E. SCHUMER, New York
HOWARD L. BERMAN, California
RICK BOUCHER, Virginia
JOHN BRYANT, Texas
JACK REED, Rhode Island
JERROLD NADLER, New York
ROBERT C. SCOTT, Virginia
MELVIN L. WATT, North Carolina
XAVIER BECERRA, California
ZOE LOFGREN, California
SHEILA JACKSON LEE, Texas

ALAN F. COFFEY, JR., *General Counsel/Staff Director*
JULIAN EPSTEIN, *Minority Staff Director*

SUBCOMMITTEE ON THE CONSTITUTION

CHARLES T. CANADY, Florida, *Chairman*

HENRY J. HYDE, Illinois
BOB INGLIS, South Carolina
MICHAEL PATRICK FLANAGAN, Illinois
F. JAMES SENSENBRENNER, JR.,
 Wisconsin
MARTIN R. HOKE, Ohio
LAMAR SMITH, Texas
BOB GOODLATTE, Virginia

BARNEY FRANK, Massachusetts
MELVIN L. WATT, North Carolina
JOHN CONYERS, JR., Michigan
PATRICIA SCHROEDER, Colorado

KATHRYN A. HAZEEM, *Chief Counsel*
WILLIAM L. MCGRATH, *Counsel*
KERI D. HARRISON, *Assistant Counsel*
JOHN H. LADD, *Assistant Counsel*
ROBERT RABEN, *Minority Counsel*

CONTENTS

HEARING DATE

March 22, 1996	Page 1
----------------------	-----------

OPENING STATEMENT

Canady, Hon. Charles T., a Representative in Congress from the State of Florida, and chairman, Subcommittee on the Constitution	1
---	---

WITNESSES

DeFazio, Hon. Peter, a Representative in Congress from the State of Oregon ..	14
English, Hon. Phil, a Representative in Congress from the State of Pennsylvania	10
Flanagan, Michael Patrick, a Representative in Congress from the State of Illinois	3
Fox, Hon. Jon D., a Representative in Congress from the State of Pennsylvania	16
Kaptur, Hon. Marcy, a Representative in Congress from the State of Ohio	7
Simon, Donald J., executive vice president and counsel, Common Cause	27
Thompson, Brent, executive director, Fair Government Foundation	33
Tobias, Robert M., national president, National Treasury Employees Union	23
Trafficant, Hon. James, Jr., a Representative in Congress from the State of Ohio	17
Upton, Hon. Fred, a Representative in Congress from the State of Michigan ...	5
Zimmer, Hon. Dick, a Representative in Congress from the State of New Jersey	12

LETTERS, STATEMENTS, ETC., SUBMITTED FOR THE HEARING

DeFazio, Hon. Peter, a Representative in Congress from the State of Oregon: Prepared statement	15
English, Hon. Phil, a Representative in Congress from the State of Pennsylvania: Prepared statement	11
Flanagan, Michael Patrick, a Representative in Congress from the State of Illinois: Prepared statement	5
Fox, Hon. Jon D., a Representative in Congress from the State of Pennsylvania: Prepared statement	17
Kaptur, Hon. Marcy, a Representative in Congress from the State of Ohio: Prepared statement	8
Simon, Donald J., executive vice president and counsel, Common Cause: Prepared statement	29
Thompson, Brent, executive director, Fair Government Foundation: Prepared statement	35
Tobias, Robert M., national president, National Treasury Employees Union: Prepared statement	24
Trafficant, Hon. James Jr., a Representative in Congress from the State of Ohio: Prepared statement	19
Upton, Hon. Fred, a Representative in Congress from the State of Michigan: Prepared statement	6
Zimmer, Hon. Dick, a Representative in Congress from the State of New Jersey: Prepared statement	13

ETHICS IN GOVERNMENT AND LOBBYING REFORM PROPOSALS

FRIDAY, MARCH 22, 1996

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, in room 2237, Rayburn House Office Building, Hon. Charles T. Canady (chairman of the subcommittee) presiding.

Present: Representatives Charles T. Canady, Henry J. Hyde, Bob Inglis, Michael Patrick Flanagan, F. James Sensenbrenner, Jr., Bob Goodlatte, Barney Frank, and Melvin L. Watt.

Also present: Kathryn A. Hazeem, chief counsel; John H. Ladd, assistant counsel; Mark Carroll, staff assistant; and Robert Raben, minority counsel.

OPENING STATEMENT OF CHAIRMAN CANADY

Mr. CANADY. The subcommittee will come to order.

Last December the Congress ended more than 40 years of gridlock by passing the Lobbying Disclosure Act. Efforts to pass the Lobbying Disclosure Act in the House of Representatives began in this subcommittee in what was truly a bipartisan effort, and I want to again thank Mr. Frank, who is the ranking minority member of this subcommittee, as well as Mr. Bryant of Texas for the leadership role that they played in helping move forward the Lobbying Disclosure Act.

A week ago today, the Clerk of the House of Representatives and the Secretary of the Senate released information showing that the number of registered lobbyists has doubled since the Lobbying Disclosure Act became effective on January 1 of this year. I believe this shows that the Lobbying Disclosure Act of 1995 is having its intended effect. I would add, however, that to provide additional clarity to some of the act's provisions, subcommittee staff is working on a technical corrections bill in a bipartisan fashion that will address a number of interpretative issues arising under the Lobbying Disclosure Act.

Today the subcommittee holds an oversight hearing on ethics in government and lobbying reform proposals. In our first panel today we will hear from a number of our distinguished House colleagues on issues that either were debated or might have been debated in connection with the House's consideration of the Lobbying Disclosure Act last year. Several Members heeded our pleas to help us avoid going to a conference with the Senate on this legislation by

not amending the bill. I am pleased to say that our efforts to keep the bill clean proved to be the key to success on this issue, and today this subcommittee will hear additional testimony to further evaluate many of the proposals that were submitted as amendments to the Lobbying Disclosure Act last year.

Our second panel today will examine the current status of the honoraria ban. The 1995 Supreme Court opinion *U.S. v. National Treasury Employees Union* held that the application of the honoraria ban to executive branch employees at a pay level of GS-15 and below was unconstitutional because of the significant burden the ban imposed on the first amendment rights of Federal Government employees.

On February 26 of this year, the Justice Department's Office of Legal Counsel issued an opinion to Attorney General Janet Reno stating that the Justice Department cannot know, or shouldn't speculate, whether Congress would have enacted an honoraria ban as limited in scope as that portion of section 501(b) which the Supreme Court declined to strike down. Assistant Attorney General Walter Dellinger concluded that no portion of section 501(b) survives the ruling of the Supreme Court in *National Treasury Employees Union*. It is, therefore, apparent that the Justice Department henceforth will not enforce section 501(b).

To discuss issues related to the honoraria ban, the subcommittee is pleased to have included on today's second panel a representative of the plaintiffs in the *National Treasury Employees Union* case, as well as representatives from the Fair Government Foundation and Common Cause.

We will now proceed with our first panel after I recognize Mr. Frank.

Mr. FRANK. I'll be brief, Mr. Chairman, because I agree with everything that you have said today. I want to express my appreciation to you for following through on the commitment you made on the floor to have this hearing, preparatory, I hope, toward taking action on legislation.

Several of our colleagues here withheld their amendments. In other cases they pressed their amendments and they were defeated, and those that were defeated, I think it's fair to say, were defeated not entirely on the merits; in some cases, not at all on the merits, but because Members agreed with us that, if we were to get a bill to the President to be signed, we needed to do exactly what the Senate did.

But you made the commitment, as we appreciated, to have a second round on this. We have a number of very good proposals that have come forward. I very much appreciate the diligence of our various colleagues here who have thought about this, and I am glad that we are having this hearing. And I hope that we will be able to move forward with a second round of legislation to improve on the lobbying bill we've had.

Mr. CANADY. Thank you, Mr. Frank. And let me say that I share your desire to move forward on a range of issues related to this topic.

Now we will go to our first panel. And I want to thank each of you for taking the time to be here this morning. We are very pleased that you are maintaining an interest in this issue.

On the first panel, we will hear from the vice chairman of this subcommittee, Congressman Michael Patrick Flanagan, who represents the Fifth District of Chicago. I'm sorry, the Fifth District of Illinois in Chicago.

[Laughter.]

Mr. FLANAGAN. We often think it's a State; that's all right.

[Laughter.]

Mr. CANADY. Next we will hear from Congressman Fred Upton. Congressman Upton hails from the State of Michigan and has represented its Sixth District since 1986.

Following him will be Congresswoman Marcy Kaptur from the State of Ohio. Congresswoman Kaptur is currently serving her seventh term as Representative of Ohio's Ninth District.

Then Congressman Phil English will testify. Congressman English is in his first term representing the 21st District of Pennsylvania.

Following Congressman English will be Congressman Dick Zimmer who represents New Jersey's 12th District.

Then we will hear from Congressman Peter DeFazio who represents the Fourth District of Oregon.

Next will be Congressman Jon Fox who is in his first term, representing Pennsylvania's 13th District.

And the last Member to testify before the subcommittee today will be Congressman James Traficant, Jr., who represents Ohio's 17th District.

Again, thank you for being with us.

Without objection, your full statements will be made a part of the record, and I would ask that each of you, if at all possible, summarize your testimony in no more than 5 minutes. Thank you very much.

Mr. FRANK. Mr. Chairman, if I could briefly just—I think it ought to be noted, just because of the atmosphere that people have written about, this panel reflects a fact that was true when we did the legislation; it's completely bipartisan. I think we ought to be clear that the legislation was handled in a bipartisan fashion; this is a bipartisan panel, and I think people ought to be aware that this is an important reform issue which this committee and the Congress in general has handled in a very bipartisan fashion.

Mr. CANADY. Congressman Flanagan.

STATEMENT OF HON. MICHAEL PATRICK FLANAGAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

Mr. FLANAGAN. Well, thank you, Mr. Chairman. I want to thank you for holding this hearing today. There are many important lobbying reform measures before us today, and I commend you and Mr. Frank for being true men of your word and fulfilling your promise to hold these hearings on lobbying reform, too.

Because it was necessary to send the President a clean lobby disclosure bill last November, Members of Congress were forced to withdraw their amendments and vote down a number of well-intentioned and very worthy lobbying reform amendments. I spoke on the floor for that tactic myself, as did both of you. And it speaks well of the process and speaks well of both of you that you are men

of your word, and we are here today to take up those very worthy measures.

Sadly, one of those measures was to be offered by our colleague John Dingell of Michigan. Mr. Dingell's amendment, which I co-sponsored, would have added a new section to U.S. Code 18, the Federal Criminal Statutes, to prohibit the atrocious lobbying practice associated with so-called "astroturf lobbying," in which lobbying firms falsely use a person's name and send a telegram or a letter in an effort to influence a Member of Congress on pending legislation. Mr. Dingell's amendment was in response to the despicable behavior of one of the parties that had a huge financial interest in the demise of H.R. 1555, the Telecommunications Act of 1995.

In August of last year, during the consideration of H.R. 1555, many Capitol Hill offices, including my own and Mr. Dingell's, received thousands, literally thousands, of computer-generated form telegrams. They were supposedly from our constituents outraged over the telecommunications deregulation and reform legislation. But after my staff contacted several hundred of those names and addresses that appeared on the telegrams, our results revealed that only a tiny fraction of the "senders"—I'm talking about only a handful—even knew their names had been used in this way. One gentleman's widow told us that her husband had supposedly sent a telegram, but had been long deceased.

While Mr. Dingell and I decided to withdraw the amendment for the strategic reasons I talked about already—that is, the passage would have forced the Lobbying Disclosure Act to be referred back to the Senate, where it certainly would have met an unfortunate and procedural death—we did put our heads together and introduced H.R. 3128, which is before the subcommittee today.

H.R. 3128 is designed to outlaw sending fraudulent lobby communications like those sent during last year's telecommunications reform debate. Under H.R. 3128, lobbying firms who falsely use a person's name in any telegram, letter, or electronic communication will be punished with a maximum fine of \$50,000. This bill is a necessary step in ending those despicable lobbying techniques, and I urge all my colleagues to support it.

While H.R. 3128 is a good first step, we do not believe it is enough. Other measures are needed to control the excesses of astroturf lobbying. I believe it is important for Congress to also consider legislation that would require full disclosure of the expenditures on astroturf lobbying. Neither last year's lobbying reform bill, nor H.R. 3128 in its present form, requires disclosure for the expenditures on paid astroturf lobbying. I believe this is important information and should be included in the registration and reports filed by lobbyists or professional organizations that regularly astroturf lobby. This could be accomplished through separate legislation or through amendment to this very bill which I hope to introduce in the near future.

Mr. Chairman, I want to again thank you and Mr. Frank for holding this hearing today. I hope we can schedule a markup soon on lobbying reform legislation, and I thank you once again.

[The prepared statement of Mr. Flanagan follows:]

PREPARED STATEMENT OF HON. MICHAEL PATRICK FLANAGAN, A REPRESENTATIVE IN
CONGRESS FROM THE STATE OF ILLINOIS

Mr. Chairman, Thank you for the holding this hearing today. There are many important lobbying reform measures before us today and I commend you and Mr. Frank for being true men of your word by fulfilling your promise to hold these hearings on Lobbying Reform II.

Because it was necessary to send to the President a "clean" lobbying disclosure bill last November, members of Congress were forced to withdraw and vote down a number of well intended and worthy lobbying reform amendments.

Sadly, one of these measures was to be offered by our colleague, John Dingell of Michigan. Mr. Dingell's amendment, which I co-sponsored, would have added a new section to U.S. Code 18, the federal criminal statutes, to prohibit the atrocious lobbying practice associated with so-called "astroturf" lobbying in which lobbying firms falsely use a person's name in a telegram or letter in an effort to influence a member of Congress on pending legislation.

Mr. Dingell's amendment was in response to the despicable behavior of one of the parties that had a large financial interest in the demise of H.R. 1555, the Telecommunications Act of 1995. In August, during consideration of H.R. 1555, many Capitol Hill offices, including mine and Mr. Dingell's, received thousands of computer generated form telegrams. They were supposedly from our constituents outraged over the telecommunications deregulation and reform legislation. But after my staff contacted over 200 of those whose names and addresses that appeared on the telegrams, our results revealed that only a tiny faction of "senders"—I am talking about only a handful—even knew their names had been used in this way. One gentleman's widow told us that her husband, who had supposedly sent a telegram, had long been deceased.

While Mr. Dingell and I decided to withdraw the amendment for logistical reasons—that is, its passage would have forced the Lobby Disclosure Act to be referred back to the Senate where it would have certainly met an unfortunate death—we did put our heads together to introduce H.R. 3128 which is before the subcommittee today.

H.R. 3128 is designed to outlaw the sending of fraudulent lobbying communications like those sent during last year's telecommunications reform debate. Under H.R. 3128, lobbying firms who falsely use a person's name in any telegram, letter or electronic communication will be punished with a maximum \$50,000 fine. This bill is a necessary step in ending these despicable lobbying techniques and I urge all my colleagues to support it.

While H.R. 3128 is a good first step, I don't believe it is enough. Other measures are needed to control the excesses of "astroturf" lobbying. I believe it is important for Congress to also consider legislation that would require flat disclosure of expenditures on "astroturf" lobbying. Neither last year's lobbying reform bill nor H.R. 3128 requires disclosure of expenditures on paid "astroturf" lobbying. I believe this important information should be included in the registration and reports filed by lobbyists or professional organizations that regularly "astroturf" lobby. This could be accomplished through separate legislation which I hope to introduce in the near future.

Mr. Chairman, I again want to thank you for holding this hearing today. I hope we can schedule a mark-up soon on Lobbying Reform II. Thank you, Mr. Chairman.

Mr. CANADY. Thank you, Mr. Flanagan.
Congressman Upton.

STATEMENT OF HON. FRED UPTON, A REPRESENTATIVE IN
CONGRESS FROM THE STATE OF MICHIGAN

Mr. UPTON. Thank you, Mr. Chairman. I would ask unanimous consent that my full statement be made part of the record, and would also thank you and Mr. Frank for holding these hearings. I was one that, in deference to you, did withhold my amendment from being offered on the House floor last fall, to make sure that the many lobbying reform proposals, in fact, were included and were able to get signed by the President in a very expeditious manner.

My bill, H.R. 459, permanently bans former Members of Congress from lobbying on behalf of a foreign government. I happen to believe that this amendment would have passed as part of H.R.

2564, but it would have opened up a Senate conference, and who knows what would have happened? And that's why I withdrew my amendment.

I happen to believe that it is wrong for Members of Congress of this body to use their jobs here in a revolving-door fashion to later lobby on behalf of a foreign government. Currently, executive branch officials and trade officials are, in fact, barred for life—from this practice. As we work to restore public confidence in the Congress, we should apply the same standards to Members of Congress as there are in the executive branch.

I feel that we need to encourage folks to become public servants for the right reasons, not the wrong ones, and we shouldn't use the time spent here to be able to cash in on behalf of a foreign government later on.

And I would yield back the balance of my time, and I would hope that you would include this as part of your bill, as you move forward, not in a threatening way, I am prepared to go to the Rules Committee and try to get this offered on the House floor.

Thank you for your time, and thanks for living up to your commitment that you made last fall.

[The prepared statement of Mr. Upton follows:]

PREPARED STATEMENT OF HON. FRED UPTON, A REPRESENTATIVE IN CONGRESS FROM
THE STATE OF MICHIGAN

Thank you for giving me the opportunity today to testify before the Subcommittee on the Constitution. I applaud your continued desire to examine lobbying reform proposals.

My bill, H.R. 459, will permanently ban former Members of Congress from lobbying on behalf of a foreign government. I introduced this bill because I believe it is wrong for former Members to use their jobs as a revolving door to cash in later on behalf of a foreign government. Currently, there is only a one year ban on this activity. Executive branch officials and trade officials are barred for life from lobbying on behalf of foreign governments. As we work to restore public confidence in Congress, we should apply this same standard to Members of Congress.

Americans are very apprehensive about the role that lobbyists play in shaping legislation, and with good reason. All too often, our elected leaders represent the most influential lobbyists rather than the people who elected them. I am glad that the 104th Congress has enacted several important reforms in order to correct this situation.

I feel that we need to encourage people to become public servants for the right reasons. The reward is helping people while you serve. It's not right that taxpayers send their representative to Washington to fight for them, and then that elected official leaves office and sells that knowledge to another government at the expense of the American people. I was sent to Washington to represent southwest Michigan, not to learn how to represent a foreign country.

I was prepared to offer this bill as an amendment to H.R. 2564 when it was brought to the House Floor in November of last year. I agreed to withdraw my amendment in order to ensure that the many important lobbying reform provisions included in H.R. 2564 made it to the President's desk without any further delays. I was assured by Chairman Canady at the time that this Subcommittee would hold hearings on the subject and I am glad to see this promise fulfilled. I look forward to working with all you of on this important issue during the remainder of the 104th Congress.

I appreciate your consideration of this proposal.

Mr. CANADY. Thank you, Mr. Upton.
Representative Kaptur.

STATEMENT OF HON. MARCY KAPTUR, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OHIO

Ms. KAPTUR. Thank you very much. Mr. Chairman, Mr. Frank, I want to thank you for holding these hearings, keeping your word to the membership. It is truly appreciated.

And I ask that my full statement be included in the record and will just summarize very briefly. I'm getting to feel very comfortable testifying before this committee because it's happened now for 11 years.

And the bill that I am testifying regarding today is H.R. 2498, the Foreign Agent Compulsory Ethics in Trade Act. And I believe that it's essential to include in lobbying reform efforts this measure in order to restore the confidence of our citizens in the political process itself. I also want to thank Congressman Frank for incorporating this bill into his larger lobbying reform measure, H.R. 2686.

I just wanted to put a little bit of history here, if I might. I first introduced this bill in 1985, and the reason that I did it is that I was preparing to take my first trip abroad as a Member of this body to Japan, and I met with several business leaders from my district, including one gentleman who came to the meeting upon invitation, but sat and never said a word. And I went up to him afterwards and I said, "Gosh, you came. You sat in this roundtable discussion. You didn't say anything."

And he said, "Well, see, I just came to listen to you because," he said, "I don't trust the Government of the United States anymore."

And I said, "Well, what exactly happened to you?" And he told me that he had participated in a U.S. Department of Commerce trade mission in 1984, and during that trip had given proprietary information about his company to those officials, and then returned to the United States; 2 years later came back to Washington and found the very people that he had given that information to working on behalf of his competitors. And that was my first practical experience with what some of our citizens have faced in dealing with the Government of the United States.

But I then learned that this was not an isolated case. A 1990 report by the Center for Public Integrity entitled, "America's Front-Line Trade Officials," found that about half of White House trade officials who served during the 15-year time period from 1975 to 1990 subsequently went to work on behalf of foreign interests, the same parties that they had negotiated against technically by our Government, and then came back and lobbied our Government.

I never realized how significant that was. I then learned, after serving a few more years, that many of those contracts averaged \$400,000 annually, representing some of those interests, and we found a revolving door in our trade agencies where we have very low seniority; the average tenure is almost a year, year and a half, compared to other nations where they have 20, 30 years' seniority. And the reason was because they just go in, get a little bit of experience, and then go out and then lobby the very Government that they have been representing.

For the record, we are also submitting a 1992 GAO report that we requested entitled, "Former Federal Officials Representing Foreign Interests Before the U.S. Government." This report identified

82 former officials, including Members of Congress, White House officials, congressional staff, and executive branch personnel, between the years of 1986 and 1991. So we will be submitting that for the record.

I just might mention that, in spite of what Congressman Upton said, the most we've ever been able to get enacted into the law is a 1-year cooling-off period. There is not a permanent ban. What we were able to get through is very weak and it doesn't deal with the guts of this problem. In fact, I just learned this week as a member of the Agriculture subcommittee on which I serve that several interests in this country have now filed a special petition on the issue of avocados, which is a big question on the west coast, and it appears as though someone who was an employee of the Government of the United States simultaneously was working on behalf of a foreign party, which is now part of the petition that has been filed by that industry in order to reopen this issue before the Government of the United States.

I also am going to submit for the record eight pages of American firms, mostly located here in Washington, now registered as foreign agents of the Japanese. And last year during the negotiations on opening Japan's market to U.S.-made auto and auto parts—this helps to underline why we may have difficulty in being more successful at concluding those negotiations favorably toward our country.

So, Mr. Chairman, I just want to say, finally, that if you look at what other countries do, this kind of activity is absolutely not allowed. In fact, in a nation as Japan, our major trade competitor right now, foreign lawyers are not even allowed to practice.

So it seems to me that we have an obligation to our citizenry to really take a serious look at this issue. I know that the reason we have been unsuccessful in moving this bill is because of the amount of money involved on behalf of those who benefit, but that shouldn't be our measure. And I would really plead with the committee for favorable consideration of including the major parts of our legislation in your bill. And let me say we are not against people going to work on behalf of any foreign corporation. Our problem is when they use their access to then work for that corporation and lobby the Government of the United States. That's where we want to sever the access.

Thank you very much.

[The prepared statement of Ms. Kaptur follows:]

PREPARED STATEMENT OF HON. MARCY KAPTUR, A REPRESENTATIVE IN CONGRESS
FROM THE STATE OF OHIO

Thank you, Chairman Canady and Members of the Subcommittee, for continuing your important hearings on lobbying reform, a topic essential to restoring the confidence of our citizens in our political process, and for allowing me to testify before you today in support of the Foreign Agents Compulsory Ethics in Trade Act, the FACE-IT bill, H.R. 2498. Please let me also thank Congressman Frank for incorporating my bill into his larger lobbying reform measure, H.R. 2686.

I first introduced FACE-IT, H.R. 2498, in 1985 in what I thought would be a straightforward effort to close the revolving door between government service and lobbying for foreign interests. My particular concern related to the integrity of our trade-making process. It has now been eleven years and I have learned a great deal about Washington's reluctance to curb the connection between special interest money and access to the legislative process.

I originally became interested in this subject in 1985 when I was studying the trade deficit and met a businessman from my district named Don Ahrens. Mr. Ahrens was an auto parts manufacturer and exporter who participated in a U.S. Department of Commerce Trade Mission abroad in 1984. During that trip, he shared proprietary information about his business with U.S. officials in charge of the mission. When I met with him in 1985, he explained that to his dismay, the same people he had previously dealt with in the U.S. government were now, in fact, working on behalf of his foreign competitors.

This is not an isolated case. A 1990 report by the Center for Public Integrity entitled *America's Front Line Trade Officials* found that about half of White House trade officials who served during a fifteen-year time period between 1975 and 1990 subsequently went to work for foreign interests—the same parties they formerly negotiated against—upon leaving government service. Most have ended up working for foreign interests because major sums can be earned there—up to four times as much as lobbying for a domestic concern. This is a sad commentary on what has happened to Washington.

In March of 1992, at the request of many Members of Congress, the GAO published a report entitled "Former Federal Officials Representing Foreign Interests Before the U.S. Government." This report identified 82 former high-level federal officials—including Members of Congress, White House officials, Congressional staff, and executive branch personnel—who, after leaving government service between fiscal years 1986 and 1991, registered as foreign agents and represented foreign interests before the U.S. government.

This is just the tip of the iceberg. The actual numbers of former high-level federal officials registered as foreign agents is likely to be much higher. GAO admits that, because of the shortcomings in the databases, it is highly likely that they did not identify all former high-level federal officials representing foreign interests before the U.S. government. And there are numerous foreign agents who simply do not register.

Although I have been proposing and reintroducing the FACE-IT bill in each Congress since 1985, this issue was never "brought home" to me more clearly than it was last year during the negotiations to open Japan's market to U.S.-made autos and auto parts. I would like to submit for the record eight pages of American firms, mostly located here in Washington, now registered as foreign agents of the Japanese—and Japan is just one example. A cursory glance at the personnel lists of many of these firms will reveal many former U.S. government officials among their ranks.

We have seen too many government officials negotiating with one eye on post-employment opportunities with their counterparts on the other side of the negotiating table. How can we be sure that U.S. negotiators are working aggressively on our behalf when they have their eyes on future employment with our trading partners? The integrity of the very institutions we expect to protect America's economic interests in the global marketplace is at stake.

To take just one example, as the U.S.-Japan auto negotiations were reaching a climax, the law firm of Akin, Gump, Strauss, Hauer & Feld earned \$2.1 million dollars representing prominent Japanese corporations such as Mazda, Fujitsu and Matsushita. Many of the representatives of this firm are former U.S. government officials.

Can you imagine any American doing in Japan what the Japanese do to influence our public policy? It would be unthinkable. Can one even imagine a Japanese citizen or government official representing U.S. interests in Japan? Foreign lawyers cannot even practice in Japan. At a time of huge U.S. trade deficits, America's economic competitiveness directly affects our national security and financial well-being.

Given the importance of the automotive industry on the U.S. economy, I take our efforts to open Japan's market to U.S. autos and auto parts very seriously. But time and time again, I have witnessed former government officials using the contacts and knowledge they acquired at the expense of U.S. taxpayers to represent not American interests, but those of foreign nations.

The FACE-IT bill, introduced with bipartisan support in each Congress since 1985, would impose a lifetime ban on high-level government officials from aiding, advising or representing foreign governments and foreign political parties before the U.S. government. It would establish a five-year prohibition against representing, aiding, or advising other foreign interests before our government. It would not prohibit these individuals from working for foreign interests, but it would draw the line at representing, aiding or advising them before the government of the United States.

By way of legislative history, I would point out that in previous incarnations of this bill which I introduced from 1985 through the 102d Congress, the bill would

have prevented high-level government officials from representing foreign interests for a period of *four years* after leaving government service. The bill was revised in the 103d Congress to bring it in line with President Clinton's commitment to have Administration employees sign a pledge which imposed a lifetime ban on lobbying for foreign governments and foreign political parties. But the best solution is to bar the activity in the first place since the enforcement of these activities by the Justice Department is likely to be haphazard.

One of the results of the revolving door in trade is an erosion of the public's trust and confidence in our government. Government service should once again become a worthy career goal in and of itself, rather than simply serving as a stepping stone to the gravy train. The American people deserve to know that their representatives in government are consistently working for trade and economic policies that are in America's best interests first and foremost, and not for their personal gain. I therefore encourage this Committee to pass the FACE-IT bill, H.R. 2498, and bring it to the floor as soon as possible. Thank you.

Mr. CANADY. Thank you, Representative Kaptur.

Mr. English.

STATEMENT OF HON. PHIL ENGLISH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF PENNSYLVANIA

Mr. ENGLISH. Thank you, Mr. Chairman. I'd like to thank you and the members of this very distinguished subcommittee for affording me the opportunity to talk about where we should go with further lobbying reform. I'd like to specifically speak to an issue of direct interest to the American workers and the American companies that are within my district competing internationally. I feel very strongly that the Secretary of Commerce and members of the International Trade Commission should be held to the same lobbying restrictions as other high-ranking trade officials.

Under the Lobbying Disclosure Act enacted by this Congress, officials from the Office of the U.S. Trade Representative are prohibited from representing foreign countries. To me, it stands to reason that other former trade officials must also be prevented from using their specialized knowledge of U.S. trade laws and regulations to benefit foreign interests. Their insider knowledge of U.S. trade and business contacts gives their new employers an upper hand in trade and manufacturing negotiations while netting a hefty profit for themselves. We must put an end to this revolving door of public service to personal profit by former Washington trade officials.

Specifically, the International Trade Commission is given broad powers of investigation under the Tariff Act of 1930. In order to carry out these responsibilities, the Commission is required to engage in extensive research, conduct specialized studies, and maintain a high degree of expertise in all matters relating to commercial and international trade policies by the United States.

Six Commissioners are appointed by the President with the consent of the Senate for 9-year terms. Between 1973 and 1990, 6 of the 13 ITC Commissioners went to work as either foreign agents or advisors to foreign companies. Of these, three went to work for firms that represented Japanese business interests. These are top-level trade officials who are using their expertise that they gained from the U.S. Government to now help the competition. These people ruled in trade proceedings; then they went to work for our competitors. In Washington that is currently considered legal. In the country at large that's considered just plain wrong.

The Secretary of Commerce is responsible for administering all functions and authorities assigned to the Department of Commerce,

as well as advising the President on Federal policy regarding the industrial and commercial segments of the national economy. The Secretary of Commerce makes critical trade contacts and is very involved in the development of America's trade strategy. In my view, it is important that legislation provide for equal treatment of all trade officials who have the opportunity to exploit their insider knowledge of U.S. trade strategy and policy for personal gain, and that should include the Secretary of Commerce.

Representative Jim Traficant, whom you will be hearing from in a moment, and I offered a bipartisan amendment to the Lobbying Disclosure Act which would have included both the Secretary of Commerce and the Commissioners of the ITC in a ban from lobbying for foreign interests. Unfortunately, this amendment lost by only 17 votes, and I understood the rationale and argument of some of those who wanted to keep the bill clean.

I believe that by extending now the ban on lobbying to include the Secretary of Commerce and members of the ITC we are protecting American companies and American workers and preserving the integrity of U.S. trade law enforcement.

Thank you again for giving me the opportunity to present my testimony on this most important aspect of lobbying reform. It is important that the American worker be protected against this type of high-level influence peddling. U.S. trade strategy and policy must not be manipulated for personal gain by former trade officials. We have now in this Congress the opportunity to close the loophole and preserve the integrity of American trade officials.

Thank you, Mr. Chairman. I yield back the balance of my time.
[The prepared statement of Mr. English follows:]

PREPARED STATEMENT OF HON. PHIL ENGLISH, A REPRESENTATIVE IN CONGRESS
FROM THE STATE OF PENNSYLVANIA

I would like to thank Chairman Canady and the Members of the Judiciary Subcommittee on the Constitution for allowing me the opportunity to speak at this hearing to further reform lobbying disclosure laws.

I feel very strongly that the Secretary of Commerce and members of the International Trade Commission should be held to the same lobbying restrictions as other high ranking government officials. Under the Lobbying Disclosure Act of 1995, officials from the Office of the United States Trade Representative are prohibited from representing foreign countries. It stands to reason that other former government trade officials must also be prevented from using their specialized knowledge of U.S. trade laws and regulations to benefit foreign interests. Their insider knowledge of U.S. trade and business contacts gives their new employers an upper hand in trade and manufacturing negotiations while netting a hefty profit for themselves. We must put an end to this revolving door of public service to personal profit by former Washington trade officials.

The International Trade Commission (ITC) is given broad powers of investigation under the Tariff Act of 1930, relating to the customs laws of the United States and foreign countries. In order to carry out these responsibilities, the Commission is required to engage in extensive research, conduct specialized studies, and maintain a high degree of expertise in all matters relating to the commercial and international trade policies of the United States. Six Commissioners are appointed by the President with the consent of the Senate for nine year terms. Between 1973 and 1990, six of the thirteen ITC commissioners went to work as either foreign agents or advisors to foreign companies. Of these, three went to work for firms that represented Japanese business interests. These are top level trade officials who are using expertise that they gained from the United States government to now help the competition.

The Secretary of Commerce is responsible for administering all functions and authorities assigned to the Department of Commerce as well as advising the President on federal policy regarding the industrial and commercial segments of the national

economy. The Secretary of Commerce makes critical trade contacts and is very involved in the development of America's trade strategy. It is important that legislation provides for equal treatment of all trade officials who have the opportunity to exploit their insider knowledge of U.S. trade strategy and policy for personal gain. In order to maintain the integrity of this high level Cabinet post, it must be included in any future lobbying disclosure laws.

Representative James Traficant and I offered a bi-partisan amendment to the Lobbying Disclosure Act of 1995 which would have included both the Secretary of Commerce and the commissioners of the International Trade Commission in a ban from lobbying for foreign interests. Unfortunately, this amendment lost by only 17 votes. I believe that by extending the ban on lobbying to include the Secretary of Commerce and the members of the International Trade Commission, we are protecting American companies and American workers and preserving the integrity of United States trade law enforcement.

Thank you for giving me the opportunity to present my testimony on this important aspect of lobbying reform. It is important that the American worker is protected against this type of high level influence peddling. United States trade strategy and policy must not be used for personal gain by former trade Officials. We have the opportunity to close the loophole and preserve the integrity of American trade officials.

Mr. CANADY. Thank you, Mr. English.
Representative Zimmer.

STATEMENT OF HON. DICK ZIMMER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW JERSEY

Mr. ZIMMER. Thank you, Mr. Canady. Mr. Chairman, Mr. Frank, I want to commend you for shepherding through the Lobbying Disclosure Act last year. I was one of those who deferred the effort to improve the legislation by adding my ideas to it, and I am very grateful for the opportunity to come back before this subcommittee and urge you to finish the job now by including a number of the ideas that have been proposed this morning.

My legislation is called the Revolving Door Act, which I am sponsoring along with Representative Meehan. It's sponsored in the U.S. Senate by Senator McCain and Senator Feingold.

In keeping with the bipartisanship that Mr. Frank referred to, it is a thoroughly bipartisan initiative which is designed to strengthen legal prohibitions against former top Federal officials who use the friendships, the knowledge, and the access derived from their public employment to lobby former colleagues on behalf of private clients.

Current law, as you know, prohibits senior employees in the executive branch, such as Cabinet Secretaries and top White House officials, from contacting any other senior officials in an executive agency for 1 year. Members of Congress, likewise, are barred from contacting Members or staff of either House of Congress for 1 year.

Our bill would extend the ban to a minimum of 2 years, and contacts with former congressional committee colleagues and their staff would be prohibited for 5 years. The same standards would apply to executive branch personnel.

The Revolving Door Act would, for the first time, ban former White House staffers from lobbying Congress after leaving Federal service. Similarly, former Members of Congress and top congressional staff would be prevented from lobbying the executive branch as well as Congress. In addition, the bill would apply to former top officials who supervise lobbyists even if they don't lobby in person.

The bill also contains other significant provisions. It would prohibit former Members of Congress who become lobbyists from using

their leftover campaign funds to contribute to a Federal election. It would bar lobbyists from exercising privileges given to them as former Members that allow them to have special access to current Members, including access to the House floor, the House Cloak Room, the House Gym, and the Members' private dining room. It would permanently ban former Members of Congress from lobbying if they have been convicted of a felony. And in response to the issues that have been raised by Representatives Upton, Kaptur, and English, it would permanently prohibit former Members of Congress, top executive branch appointees, and senior congressional appointees from lobbying on behalf of a foreign government, business, or individual.

Mr. Chairman, the restrictions I just outlined may seem to some to be onerous, but I believe that they're reasonable and they're necessary. When I read about a former Member of Congress, now a lobbyist, who was reprimanded during the 103d Congress by the Speaker for lobbying former colleagues on the House floor or a former Member who served time for accepting bribes in the Abscam sting, who returned to Washington as a paid lobbyist for Libya, I cannot blame the American people for being cynical about government.

The reforms encompassed in the Revolving Door Act should help to restore the public's faith in our Government. Mr. Chairman, this Congress has already made great strides in eliminating the politics-as-usual syndrome that has plagued the Nation's Capitol. I strongly urge you to continue on that path toward government reform and send this bill to the floor before the end of this Congress.

I yield back the balance of my time.

[The prepared statement of Mr. Zimmer follows:]

PREPARED STATEMENT OF HON. DICK ZIMMER, A REPRESENTATIVE IN CONGRESS
FROM THE STATE OF NEW JERSEY

Chairman and members of the committee, thank you for allowing me to testify on the need for tighter lobbying restrictions. This committee should be commended for focusing on the gray area that exists between public service and private gain.

I introduced the Revolving Door Act, along with Representative Meehan, last year in an effort to strengthen legal prohibitions against former top federal officials who use the friendships, knowledge and access derived from their public employment to lobby former colleagues on behalf of private clients.

Current law prohibits senior employees in the Executive Branch, such as cabinet secretaries and top White House officials, from contacting any other senior officials in an executive agency for one year. Members of Congress likewise are barred from contacting members or staff of either house of Congress for one year.

Our bill would extend the ban to a minimum of two years. Contacts with former congressional committee colleagues and their staff would be prohibited for five years. The same standards would apply to executive branch personnel.

The Revolving Door Act would for the first time ban former White House staffers from lobbying Congress after leaving federal service. Similarly, former members of Congress and top congressional staff would be prevented from lobbying the Executive Branch as well as Congress.

In addition, the bill would apply to former top officials who supervise even if they do not lobby in person. The bill also contains other significant provisions. It would:

- Prohibit former members of Congress who become lobbyists from using their leftover campaign funds to contribute to a federal election;

- Bar lobbyists from exercising privileges given to them as former members that allow them to have special access to current members, including access to the House floor, cloakroom, gym and members' private dining room.

- Permanently ban former members of Congress from lobbying if they have been convicted of a felony; and

Permanently prohibit former members of Congress, top executive branch appointees and senior congressional appointees from lobbying on behalf of a foreign government, business or individual.

Mr. Chairman, the restrictions I just outlined may seem to some to be onerous, but I believe they are reasonable and necessary. When I read about a former member of Congress, now a lobbyist, who was reprimanded last year by the Speaker for lobbying former colleagues on the House floor, or a former member who served time for accepting bribes in the Abscam sting who returned to Washington as a lobbyist for Libya, I cannot blame the American people for being cynical about the government. The reforms encompassed in the Revolving Door Act should help to restore the public's faith in our government.

Mr. Chairman, this Congress has already made great strides in eliminating the "politics as usual" syndrome that has plagued the nation's capitol. I believe this legislation can be a strong and effective step toward reforming our government.

Mr. CANADY. Thank you, Mr. Zimmer.
Mr. DeFazio.

STATEMENT OF HON. PETER A. DeFAZIO, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OREGON

Mr. DeFAZIO. Thank you, Mr. Chairman, Mr. Frank. I'd just like to briefly summarize and submit the full statement for the record.

My bill makes one simple point, and I'd like to suggest one other reform for the committee. My No Secrets in Congress Act would require one simple thing of Members of Congress, and that is to disclose by keeping a log book in our office, that would be available for public review, of visits by paid lobbyists and a brief description of the subject of the conversation. I mean, as it works today, if we accept travel from an interest group, that has to be disclosed within 30 days. If you accept a contribution from an interest group, under Federal law that has to be disclosed. Administration officials have to disclose their contacts, the significant contacts, with lobbyists, policymaking, high-ranking administration officials.

And I believe that this on the part of Congress would be a welcome addition to that sort of disclosure. It would dispel, I believe, a great deal of cynicism on the part of the public because, if we each think about our own visits, the preponderance of the time is spent visiting with constituents who come to visit from the district, not with those highly-paid, high-charged Washington, DC, lobbyists. And to the extent that we do spend time with those lobbyists, we should certainly be willing to disclose and account to our constituents.

Now this will be strongly opposed. Mr. Wright Andrews, who is president of the American League of Lobbyists—that is, the lobby for lobbyists—said that this bill "is going to drive lobbyists crazy," as quoted in Roll Call. I think anything that might cause them a bit of discomfort probably is a meritorious reform and warrants consideration by the committee.

One other quick point: I applauded the Speaker last year when he moved ahead with THOMAS and the access to documents for members of the public, because that helps outweigh the influence of paid lobbyists or the feeling that constituent groups need to hire paid lobbyists. However, it has not been fully or widely implemented. And I would suggest, either through the Rules of the House or by action by this committee, we could move to much fuller availability of congressional documents. The technology is here today. With scanners, there is no reason why a great number of the

documents produced here, committee reports, committee marks, the amendments that are to be offered on the floor, couldn't be made available on a very timely basis to people across America through THOMAS on the Internet, so that folks at home feel less distanced and less mystified by the goings-on here in Washington, DC.

With that, I thank the Chair for his indulgence.

[The prepared statement of Mr. DeFazio follows:]

PREPARED STATEMENT OF HON. PETER A. DEFazio, A REPRESENTATIVE IN CONGRESS
FROM THE STATE OF OREGON

I would like to thank the Chairman and members of the Committee for holding this hearing today. I was a strong supporter of the lobbying reform proposal that Congress passed last year, however, I believe there's still room for improvement.

The public feels their elected representatives are out of touch and unaccountable. They want to remove money from the elections process. Yet we all know that comprehensive campaign finance reform will be extremely difficult to accomplish. However we can make some modest changes to help restore the general public's confidence that Washington is not run by lobbyists and also empower citizens to get more directly involved in the legislative process themselves.

I propose two simple steps: allowing citizens access to information on the amount of contact between members of Congress and lobbyists and what issues they discuss, as well as, making congressional documents more accessible to the general public.

As most of us know all too well, there has been growing concern in recent years about the power and influence of special interest organizations over members of Congress and the legislative process. The news media and talk show hosts in particular, have been critical of the seeming influence of lobbyists over members of Congress. The Lobbying Reform legislation passed last year was a first step toward addressing those concerns by strengthening disclosure requirements for professional lobbyists. However, we still have a long way to go to finish the job.

I have always supported public disclosure in government activities. If a lobbyist or special interest group is spending hundreds or even thousands of dollars on a member of Congress, the public has a right to know. We have very strict limits on the amount of campaign funds individuals and organizations can give to a candidate running for office and it's all a matter of public record. Lobbying activities should be subject to the same public scrutiny.

Under current law, the public can find out that a member travels annually to participate in a conference for a specific industry or organization. The public can also find out what political contributions a member has received from that same industry or organization. That's good. But what the public doesn't have access to is how much time during the year that member spends with that industry or organization discussing issues. And they should. Public officials must be accountable for their actions. This type of information is a missing link that would help citizens evaluate their member's performance.

I have introduced legislation to address this gap. My legislation would require each congressional office to record visits by registered lobbyists. This record would be available to the public and would include the date of the visit, the name and affiliation of the individual, and the subject of the visit. Our constituents and the public at large could then track their elected Members' contact with special interest organizations and associations, or anyone else seeking to influence the workings of Congress.

There's nothing wrong with meeting with lobbyists. It's a necessity in this job. But when the same lobbyists who press their client's cases in our offices also contribute to congressional campaigns, the relationship begins to seem less innocent. By shining light on the relations between lobbyists and Members of Congress, my bill might have the secondary and beneficial effect of decreasing the corrupting flood of campaign contributions from well-heeled D.C. lobbyists.

My "No Secrets in Congress Act" proposal is not likely to be popular with the lobbying corps in Washington, D.C. As Wright Andrews, President of the American League of Lobbyists told Roll Call, "This [bill] is going to drive lobbyists crazy." But it's a much-needed antidote for public mistrust and cynicism.

I also favor reforms that would give the general public greater access to congressional resources and public documents so they can more effectively influence Congress themselves. We don't need Congress dependent on professional lobbyists and special interest organizations for information and advocacy.

I was very heartened last year when Speaker Gingrich announced the creation of THOMAS which would, "allow average Americans to tap into the workings of Congress, thus allowing them to thwart the Washington media elite." The Speaker went on to promise to give Americans "full access" to all congressional documents. But there are a host of public documents that are not readily available to the public. Many critical documents, including committee prints of bills, committee reports, amendments, Congressional Research Service reports, committee transcripts and so forth, are not readily available to many of our constituents. On-line access to these documents should be developed and I would encourage members of the committee to consider options to facilitate that process.

Once again, thank you for providing us with an opportunity to discuss additional options for strengthening and improving disclosure for lobbying activities. I look forward to working with the committee to bring about these reforms.

Mr. CANADY. Thank you.

Mr. Fox.

STATEMENT OF HON. JON D. FOX, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF PENNSYLVANIA

Mr. FOX. Thank you. Thank you very much, Mr. Chairman. I appreciate the opportunity to testify before the subcommittee on an issue which is integral to strengthening our lobbying reform efforts.

First, I would like to commend the chairman and Congressman Frank for their strong leadership in enacting the Lobbying Disclosure Act into the law. I appreciate also the patience of Mr. Hyde and Mr. Watt in this proposal. The chairman's tireless efforts assisted in seizing the stark opportunity to pass a lobbying disclosure bill fit for Presidential signature after 40 years of gridlock.

Since the new law went into effect, records have demonstrated that the number of registered lobbyists and organizations has doubled in comparison to the old law. I'm pleased that such evidence demonstrates that the new lobbying law is having its intended impact.

My amendment to the Lobbying Disclosure Act will prohibit registered lobbyists from giving gifts to Members, officers, and employees. You might recall that H. Res. 250 put a duty on us not to accept, but this would give the corresponding duty on the lobbyist not to present gifts to us. And it's contained in H.R. 3140.

I regard the first rule of safety in any matter as self-defense. The recently-passed House resolution requires that Members of Congress not take gifts. This proposal makes sure that lobbyists do not give gifts; therefore, making lobbyists and Members equally responsible for their actions. Implementation of this proposal can further help avoid a Member's unintentional failure to reject a gift. The lobbyist would strictly not be able to present the gift.

I understand there has been some confusion among Members since the House resolution banning gifts from lobbyists went into effect. Indeed, we need to clarify a Member's responsibility when a gift is presented. However, we also have an obligation to clarify responsibility by making lobbyists equally accountable for the gifts they attempt to give Members. Under this proposal, lobbyists will have an affirmative duty not to offer Members any gifts.

We need to continue to enact the positive reforms that this committee has already demonstrated and the leadership has. This proposal ensures that gifts do not figure into the relationship between lobbyists and Members of Congress.

I look forward to working with this subcommittee aggressively to make sure that we adopt H.R. 3140, and I thank the subcommittee for its attention.

[The prepared statement of Mr. Fox follows:]

PREPARED STATEMENT OF HON. JON D. FOX, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF PENNSYLVANIA

Mr. Chairman, I appreciate the opportunity to testify before the Subcommittee on an issue, which is integral to strengthening our lobbying reform efforts.

First, I would like to commend the Chairman for his strong leadership in enacting the Lobbying Disclosure Act into law. The Chairman's tireless efforts assisted in seizing the historic opportunity to pass a lobbying disclosure bill, fit for a Presidential signature, after 40 years of gridlock. Since the new law went into effect, records have shown that the number of registered lobbyists and organizations have doubled in comparison to the old law. I am pleased that such evidences demonstrate that the new lobbying law is having its intended impact.

As the Members of the Subcommittee may recall, I offered an amendment to the Lobbying Disclosure Act to prohibit registered lobbyists from giving gifts to members, officers, and employees of Congress. Quite simply, the amendment complemented H. Res. 250 by placing responsibility on the lobbyist, as opposed to solely on the recipient. Unfortunately, the amendment was not adopted. I, therefore, come before the Subcommittee to request its serious consideration of my proposal as the Subcommittee explores additional lobbying reform proposals.

I regard the first rule of safety in any matter as self-defense. The recently passed House resolution requires that Members of Congress not to take gifts from lobbyists. My proposal makes sure that lobbyists do not *give* gifts; therefore, making lobbyists and Members *equally* responsible for their actions. Implementation of this proposal can further help avoid a Member's unintentional failure to reject a gift. The lobbyists would strictly not be able to present the gift.

I understand that there has been some confusion among Members since the House resolution banning gifts from lobbyists went into effect. Indeed, we need to clarify a Member's responsibility when a gift is presented. However, we also have an obligation to clarify responsibility by making lobbyists equally accountable for the gifts they attempt to give Members. Under this proposal, lobbyists will have an affirmative duty not to offer members any gifts.

As representatives of the people, it is time for Congress to deliver on its promise to change business as usual in Washington. My proposal ensures that gifts do not figure into the relationship between lobbyists and Members of Congress.

I look forward to working with the Subcommittee as we aggressively move ahead on lobby reform initiatives. I believe that my proposal is key to attaining such reform in a strong and logical way. I, therefore, urge the Subcommittee's serious consideration of my proposal.

Mr. CANADY. Thank you, Mr. Fox.

Mr. Traficant.

STATEMENT OF HON. JAMES A. TRAFICANT, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OHIO

Mr. TRAFICANT. Thank you, Mr. Chairman.

I have a couple of concerns to start out with. I keep hearing that we've had all these good ideas, but all through the debate on the changes that we made this year all these good ideas would have killed the original bill. And if all these good ideas would have killed the original bill, I'm just wondering what chance they have now, when the major vehicle has been passed.

My bill is very straightforward. Everybody understands this because it's been year after year after year, and every year I hear "great bill, great bill; you're right, you're right; next year, next year, next year." Well, we've had a lot of constipation, but no clear movement here, folks—keyword: "movement."

What I want to talk about is the Foreign Agents Registration Act that nobody abides by, is vague in nature, that most people dis-

regard. It has very little investigative powers, no subpoena powers, very little enforcement. In fact, it's a joke. The original foreign agents legislation dealt with James Bond activities in this country, and we're not dealing with James Bond activities anymore; we're dealing with trade people, people who represent the foreign interests, who avoid registration, don't even take the time to bother to register. When they are confronted, the penalties are so great that the Justice Department believes that they would be killing a gnat with a stinger missile. So, as a result, they do not even proceed to enforce it.

Therefore, there can be no good ideas of any form or fashion that can be incorporated into new legislative initiative without fundamentally changing the Foreign Agents Registration Act, which my bill, H.R. 452, does by, in fact, changing the focus to Foreign Interests Representation Act, and it forces people to register. It identifies what type of interests someone might have or must have to be considered a representative of a foreign interest. It changes the penalty section, so you don't need a stinger missile to go after somebody, and it reduces the penalties and fines as low as \$2,000 for cause. But, more importantly, we will know, and we shall know, who represents the interest of foreign entities.

So what I'm saying to this committee—and I have great regard for the committee, and I've worked with Mr. Frank on this a number of years; and, quite frankly, Mr. Frank understands Congress as well as anybody here. I think he understands this legislation that I have as well. He has a couple of concerns within it.

I want to say this to the committee: without changing the major tenor and focus, you can amend it; you can improve it; if you find a flaw, you can change it. This is your jurisdiction. But just let me say this to you: as long as you have less than one-third of the people who represent foreign interests even taking the time to give us partial registration, and we continue to allow that to exist, we fail. We fail, very simply. As long as we keep the major law on the books, that which was promulgated to stop Nazi infiltration, James Bond undercover business—we fail. It's time now to look at the sophisticated aspect of foreign interest representation; how, in fact, that representation is integrated into this trade deficit we have; our negative balance of payments; how people today aren't necessarily trying to find out about our stinger missile. Let the CIA, let the FBI handle that. We're leaving a whole vacuum here where we're leaving our own commercial sector at prey. People don't even have to tell us they're doing it.

Now I have been put off for years here. Now if not on that original bill, when? Now coming out with a new bill, I have my doubts, because by the testimony you've heard today, the biggest people in our Government in the executive branch end up going to work for these suckers. And they don't want it. They didn't want it. Republican administrations didn't want it; Democrat administration doesn't want it. Well, who runs this train?

I want something done on this issue. We should at least know who's lobbying our Government that represents a foreign interest. We should take it away from the archaic James Bond, Chief Inspector Clouseau madness, and put together a practical program that identifies, so that we know. I'm not telling you to stop anybody

from representing foreign interests, except in that legislative initiative I've joined with Representative English on who's now gone.

You take a look at the past 25 years at some of the heavy hitters in the executive branch of our Government that deal with international trade, matters that affect balance of payments, and you'll see some of the strongest names that, after they walked out of here, made a hell of a lot of money from some foreign countries. Am I saying they did anything wrong? Absolutely not. But we should know about it. We should know who their associates are.

I have submitted volumes of paper. I ask that any ream of paper or tissue heretofore submitted be considered as a part of this record, if it can be found and has been memorialized, and that my statement here today in its entirety, Mr. Canady, be put in the record.

And, in closing, I will say this: one thing I know is Mr. Frank in the years I have been here, when he gives you his word, it's good, and I want to commend you. Even though I don't know if this is a charade yet or not, hear me: you gave your word you'd have a hearing and you would attempt to do something on this issue. You've kept your word. I want to commend you for that, and I want to commend Mr. Frank for looking into my issue. I think it's a significant issue that changes the focus of the way we do business, and it's time we do it.

I yield back my time.

[The prepared statement of Mr. Traficant follows:]

PREPARED STATEMENT OF HON. JAMES A. TRAFICANT, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OHIO

Mr. Chairman and Members of the Committee, thank you for giving me the opportunity to testify today. I applaud you for examining the issue of foreign lobbying reform with respect to the Foreign Agents Registration Act, and my bill, H.R. 452, the "Foreign Interests Representation Act."

Mr. Chairman, every year, foreign interests spend hundreds of millions of dollars to influence the American government. They employ top-notch lobbyists, many of whom are former U.S. government officials and staff, to present their case in Washington. Our free trade policies have opened the doors to foreign investment, while an archaic law allows agents of foreign governments to work in secrecy.

The Foreign Agents Registration Act (FARA) of 1938 requires foreign agents to disclose their connections with foreign governments, foreign political parties, and other foreign principals to the Foreign Agents Registration Unit at the Department of Justice. However, according to two General Accounting Office (GAO) reports, FARA is plagued by unclear language as to who is required to register, weak investigative and enforcement provisions, and loopholes.

GAO's July 1990 report entitled, "Foreign Agent Registration: Justice Needs to Improve Program Administration," found that only 775 foreign agents, out of thousands, actually bothered to register under FARA. Since the 1990 report was released, neither the Justice Department nor Congress has rectified this breach of security. As a result, I have introduced H.R. 452, the "Foreign Interest Representation Act," which speaks directly to the GAO recommendations.

The GAO report found several problems with current law:

The Foreign Agent Registration Act was originally enacted to target Nazi and communist propaganda in the 1930s and 1940s. The term "foreign agent" was originally used to identify foreign principals in America who were spreading foreign propaganda and organizing political activities. With the end of the Cold War, however, foreign agents have shifted their emphasis from political propaganda to free trade and the global economic competition. FARA, however, remains unchanged. As a result, many individuals and law firms representing foreign interests are exempt from registration under the Act.

My bill, H.R. 452, substitutes the term "representative of a foreign interest" for "foreign agent," thus broadening the definition and closing a loophole. Likewise, the

term "political propaganda" has been dropped in favor of "promotional or informational materials." The bill makes several other similar term substitutions.

FARA provides certain exemptions to registration including commercial activities. Moreover, representatives of foreign interests are not required to notify the Registration Unit of their intention to claim an exemption. As a result, it is difficult for the Unit to determine who should and who should not be registered.

Under H.R. 452, any person who engages in political activities for the purpose of furthering the commercial, industrial or financial operations of a foreign interest would no longer be exempt. In addition, representatives of foreign interests will *now be required* to notify the Attorney General. Moreover, any person relying on an exemption under the act *must notify* the Justice Department of his or her intention.

H.R. 452 also establishes a test to determine what constitutes foreign control. Entities that are more than 50 percent foreign-owned would be presumed to be foreign controlled and required to register. Entities with 20 to 50 percent foreign ownership would also be considered foreign-controlled, but the presumption could be rebutted with evidence. Less than 20 percent foreign ownership would not require registration. Both provisions will help to clarify the law, and will lead to an increase in registration.

Timeliness of foreign agent registration and reporting remains a problem. Of the 28 registration statements reviewed in the GAO report, a whopping 68 percent had not been registered on time.

Currently, registrants must submit updated disclosure forms every six months after the initial registration. This system has made it almost impossible to know who is registered and whether the registration is up-to-date. H.R. 452 requires follow-up registration forms to be filed on January 30th and June 30th of each year. The Justice Department, however, would be given the authority to waive this provision, on a case-by-case basis, for entities whose fiscal year does not follow the calendar year.

H.R. 452 also includes language to strike an exemption under FARA which allows the President to exempt foreign governments "vital to the U.S. defense." It is my understanding that the Justice Department has not used this exemption in years.

In addition, H.R. 452 narrows the current exemption for lobbyists who have "off the record" contact with government officials. The exemption remains, however, for persons who represent foreign interests in a court of law and before the Patent and Trademark Office, whose proceedings are secret under the law.

Finally, harsh criminal penalties under FARA are another reason the Justice Department has shied away from enforcement of the Act. Under H.R. 452, any person who has failed to file, has omitted facts, or has made a false statement regarding the facts, will be fined a minimum of \$2,000, up to \$1,000,000, depending upon the nature and duration of the violation. Furthermore, the Justice Department would be given the authority to subpoena individuals for testimony and records.

The bottom line is, the American people have a right to know who is getting paid by foreign interests to influence the U.S. government. It's time to end the secrecy in foreign lobbying through uniform reporting and penalties for non-compliance.

Mr. Chairman, thank you again for the opportunity to testify and to offer my recommendations. I look forward to working with you and members of the committee on this very important legislation. I would be more than happy to address your concerns or answer any questions you or members of the committee may have at this time.

Mr. CANADY. Thank you, Mr. Traficant.

I want to thank each of you for taking the time to be with us today. We appreciate your interest in this.

And I don't have any questions. One point I want to make, our effort to keep amendments off of the bill last year was not because, at least in most cases was not because, we felt that the particular amendments would cause a problem for the bill. What we felt would cause a problem for the bill was having a conference committee, and that has been the graveyard of many proposals in the past, and we were concerned that if we got in that posture, then it may never see the light of day. So it wasn't the specific content of the amendments that we felt threatened the bill; it was the fact that they would throw the bill into a conference committee. I just wanted to make that clear.

But I appreciate your input, and we will look forward to continuing to work with you on this range of issues. I want to move forward with an additional bill this year. I can't guarantee that that's going to get to the floor. Our time is limited, but it would certainly be my desire to bring it to the floor, and I'm going to do everything I can to move forward on issues related to the subjects we have discussed today.

With that, I don't have any questions. I'd yield to Mr. Frank.

Mr. FRANK. I want to thank the Members for their work, but I also do want to comment on Mr. Traficant's comments. I'm sorry if we have damaged your ability to claim to be a victim by taking this legislation seriously. I have to say that you are suggesting that this might be a charade is absolutely unwarranted, and I don't think that kind of posturing helps with an effort to do serious legislation.

I just would add also that, while I think it is reasonable for us to have various restrictions, I want to affirm I think lobbying is a very important part of the democratic process. Some of my best friends are lobbyists. They include some people who work for a lot of money, but they also include a lot of people who are registered lobbyists who work for organizations of a public interest sort who really work quite hard and quite reasonably for compensation that's not at all excessive. So I think we should be very clear: we're not condemning the lobbying profession or denying that that's very useful. I don't think any of us would be able to do our jobs well if we didn't have well-informed, thoughtful people who cared a lot about public policy and some of them work as lobbyists. But, clearly, there are some elements of conflict of interest that ought to be addressed, and I think that we have the makings of a very important second piece of legislation here that I hope we will put together soon and send it over to the Senate in time for people to mobilize on its behalf.

Thank you, Mr. Chairman.

Mr. CANADY. Any other Members have questions?

Ms. KAPTUR. Mr. Chairman, might I just make a final very brief statement—

Mr. CANADY. Certainly.

Ms. KAPTUR [continuing]. Since some of the Members came in—

Mr. CANADY. Certainly.

Ms. KAPTUR [continuing]. As we were proceeding? I just wanted to say, as someone who has been involved in this for over a decade now, and some of the old laws are very arcane—the Foreign Agents Registration Act, which Mr. Traficant referenced was written many years ago, and he is correct that its focus was internal security. There was also a commercial exemption in that act, and what we found, as he stated in his testimony, was there really was no enforcement. It kind of disappeared inside the bowels of the Justice Department, and there were a lot of holes.

After lots of testimony and consultation, and so forth, we decided in our bill that was introduced in 1985 to try to set a standard to focus in and identify which levels of officials had significant access, et cetera, and I think our effort is to try to distinguish between those representing foreign governments and foreign political par-

ties, others involved in very sensitive trademaking decisions. And so if there's any distinction between what some of the other Members are proposing and what we are proposing, we are proposing a standard of behavior because we felt that the enforcement side over at Justice in FARA would not occur. It has not occurred over the years.

So there was also, I might add, an attorney's exemption in the original FARA. And if you look at the world we're dealing with now, I think it's very important to establish an ethical standard of behavior. And I think, after now 11 years of effort, we have a very good bill, and we would please ask the members of the committee to take a look at it. I don't think that it's extreme in any way. It's been the result of a lot of very hard work, lots of GAO studies.

And I just thank you very much for giving us this opportunity.

Mr. CANADY. Thank you very much. Again, I want to—Representative Fox, did you have any—

Mr. FOX. Just a brief comment, just to say to say that my measure, it's really a housekeeping measure. It's something that should have been included in the original legislation, not your bill, but other bills. Finally, it puts the duty back where it belongs, on lobbyists not to give, and for an item that we wouldn't know about that a lobbyist gave, a Member could put himself in jeopardy or herself unnecessarily. And it's really just squaring off the item to make sure it's better for all.

Mr. CANADY. Thank you very much. And, again, thank you for being with us.

We'll now move to our second panel. And as the second panel is coming forward, let me explain that Mr. Frank and I are going to have to leave the hearing for a brief period of time, we hope. We have been summoned to the Rules Committee, and we have a matter before the Rules Committee and we must be there at 11 o'clock. I apologize to the witnesses for that, but, unfortunately, I do not control the schedule of the Rules Committee.

Mr. FRANK. Mr. Chairman, I think if it works, we will be back in time to participate in questions, because I am particularly impressed with some of the testimony. I'm told the Rules Committee has only got a couple of people; they'll be able to take us right away. We should be back in time when the statements are finished.

Mr. CANADY. We do hope to be back very soon.

And on our second panel today we have three witnesses. First, we will hear from Mr. Robert Tobias. Mr. Tobias is here representing the National Treasury Employees Union as its national president. Next we will hear from Mr. Don Simon. Mr. Simon is the executive vice president of Common Cause, a public interest lobbying group. Concluding this panel will be the testimony of Mr. Brent Thompson. Mr. Thompson is executive director of the Fair Government Foundation, a free market oriented think tank devoted exclusively to research on political reform issues.

Without objection, your full statements will be made a part of the record, and I would ask that each of you summarize your testimony in 5 minutes or less. Again, we do thank each of you for being with us today.

Mr. Tobias.

**STATEMENT OF ROBERT M. TOBIAS, NATIONAL PRESIDENT,
NATIONAL TREASURY EMPLOYEES UNION**

Mr. TOBIAS. Thank you very much, Mr. Chairman, for inviting NTEU to testify on H.R. 1639, a proposed amendment to the honoraria restrictions in the Ethics in Government Act.

In 1989, Congress amended the act to ban honoraria to Members of Congress and extended that ban to all Federal employees. NTEU challenged that ban as it applied to employees below GS-16. The Supreme Court ruled in February 1995 that the governmental interest was insufficient to justify the limitation on the exercise of Federal employees' first amendment rights. In its decision, the Supreme Court held first that Federal employees do not relinquish their first amendment rights when they become Federal employees, and any restrictions must be justified as serving a legitimate government interest that outweighs the employee's first amendment rights.

Second, an integral aspect of the first amendment freedom is the right to be paid. The Supreme Court recognized that compensation provides a significant incentive, and that a denial of that incentive "will inevitably diminish employees' expressive output." The banning of compensation was an unlawful burden on the exercise of first amendment rights.

Third, the Court held that speculation alone that governmental interests may be impaired is not enough. There must be evidence to support a limitation on the expression of first amendment rights. There must be demonstrated ill effects when applying the ban to the immense class of Federal employees below GS-16. The Court refused to rule on a ban limited to more senior government officials.

The Supreme Court decision gave us a great deal to consider in applying that decision to H.R. 1639, and NTEU does have some significant concerns. First, we suggest that the bill be framed positively rather than negatively. We suggest the bill contain a narrow prohibition on the acceptance of honoraria by Members of Congress and senior noncareer employees, coupled with a prohibition on acceptance of honoraria by other Federal employees for appearances, speeches, or articles that, for example, involve the use of government time or resources rather than a flat prohibition, as the bill now contains with certain limited exceptions.

Second, we believe that the restriction which limits the acceptance of compensation on work-related efforts is redundant with existing statutes and regulations, and is, therefore, unnecessary. Further, there is no evidence of abuse which the statute attempts to correct.

Third, the prohibition on acceptance of compensation for an appearance, speech, or article that relates "primarily to the responsibilities, policies, or programs of the agency or office in which the individual is employed" is, I believe, dangerously vague and overbroad. It would limit an employee who writes for the Voice of America from writing an article on U.S. foreign policy. I believe that provision is a violation of the first amendment.

Fourth, NTEU is concerned that a ban on honoraria when the reason is related to an employee's official duties or status is impossible for the writer to discern or understand. I certainly can't know

someone else's reason for paying an honoraria, and I shouldn't be held accountable for it.

Fifth, NTEU believes the \$2,000 limit on honoraria raises very serious constitutional questions. Federal employees who give speeches such as Lewis B. Puller, a government lawyer who spoke as a result of his autobiography, "Fortunate Son," should be able to receive what the market will pay for his speeches. So long as the fee is usual and customary and the other tests are met, there should be no cap.

The issue of honoraria is a very difficult and complex issue, and I am pleased to provide this testimony and assist the committee in any other way to develop this most important legislation. Thank you very much.

[The prepared statement of Mr. Tobias follows:]

PREPARED STATEMENT OF ROBERT M. TOBIAS, NATIONAL PRESIDENT, NATIONAL TREASURY EMPLOYEES UNION

Good morning. I am Robert M. Tobias, President of the National Treasury Employees Union, the largest independent federal employee union. I appreciate this opportunity to address this Subcommittee on H.R. 1639, a proposed amendment to the honoraria restrictions in the Ethics in Government Act of 1978, as amended by the Ethics Reform Act of 1989.

In 1989, the Congress undertook to address the widespread public perception that the acceptance of honoraria by members of Congress constituted an ethical abuse. The measure ultimately enacted by Congress, however, went far beyond any perceived problem and barred acceptance of fairly earned compensation for speech or writings that could not conceivably raise any eyebrows. The Congress amended the Ethics in Government Act to prohibit all officers and employees of the government from accepting any compensation for any articles, speeches, or appearances—even where there was no nexus whatsoever between the speech in question and the employees' governmental duties.

I am proud that my union was in the forefront in challenging the constitutionality of this ban as it applied to executive branch employees paid at a rate below that of a GS-16. As we successfully argued to the courts, a ban on the acceptance of compensation for expressive activities severely burdens employees' First Amendment right to engage in those activities. Where, as here, the governmental interest was insufficient to justify such a burden, that restriction is unconstitutional.

The Supreme Court in February 1995 finally brought a definitive end to the legal battle. In *U.S. v. NTEU*, 115 S. Ct. 1003 (1995), the Court held Section 501(b) of the Ethics Reform Act unconstitutional as applied to plaintiffs—lower graded executive branch employees. A year later, on February 26, 1996, Assistant Attorney General Walter Dellinger issued a Memorandum Opinion concluding that no portion of the honoraria ban in 5 U.S.C. app. 501(b) survives the Supreme Court's ruling. As a consequence, the Justice Department will not enforce that provision against any Member, officer or employee of the government.

In the discussion below, I will first outline the teachings of the Supreme Court that must guide this Subcommittee's consideration of a new restriction on acceptance of honoraria. I will then analyze the provisions of H.R. 1639 in light of those teachings.

1. THE SUPREME COURT'S ANALYSIS OF THE FIRST AMENDMENT ISSUES RAISED BY RESTRICTIONS ON ACCEPTANCE OF "HONORARIA"

Federal employees do not relinquish their First Amendment rights when they join the federal government. The Supreme Court underscored that employees retain the rights they would otherwise enjoy as citizens to comment on matters of public concern. 115 S. Ct. at 1012, citing *Pickering v. Bd. of Education*, 391 U.S. 563, 568 (1968). Any restraints that Congress would impose on that free expression must be justified as serving a legitimate government interest that outweighs the employees interests. The honoraria ban contained in 501(b) could not be justified.

a. *The nature of the burden on the First Amendment*

The Supreme Court resoundingly agreed with us that a "prohibition on compensation unquestionably imposes a significant burden on expressive activity." 115 S. Ct. at 1014. The Government, in defending the ban on honoraria, had repeatedly at-

tempted to minimize that burden by declaring that employees were free to write—they just could not get paid for it. A stake has now been driven through the heart of that argument. The Court has recognized that compensation provides a significant incentive, and that a denial of that incentive “will inevitably diminish [employees’] expressive output.” *Id.* at 1014–15. That loss of incentive thus raises the most serious First Amendment concerns.

Moreover, the impact of the ban went beyond burdening the First Amendment rights of employees themselves. The Court recognized that the denial of compensation imposed a significant burden on the public’s right to read and hear what the employees would have written and said. *Id.* at 1015. Many federal employees are tremendously talented and have much of value to share with the public. A restriction on their ability to communicate those views is a matter of great constitutional consequence to the American public, as well as to the employees themselves.

Finally, the Court stressed the extraordinary sweep of the honoraria ban. It termed the ban a “wholesale deterrent to a broad category of expression by a massive number of potential speakers.” *Id.* at 1013. Because the ban is a prophylactic measure, it deters “an enormous quantity of speech before it is uttered. . . .” *Id.* at 1013 n.11. The widespread impact and the chill imposed on potential speech heightened the First Amendment concerns. *Id.* at 1014.

b. The Government’s burden of justification

Given the sweep of 501(b), the Court imposed on the Government a “heavy” burden of justification. 115 S. Ct. at 1013. It required the Government to show “that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression’s ‘necessary impact on the actual operation’ of the Government.” *Id.* at 1014 (quoting *Pickering*, 391 U.S. at 571.)

That burden is not satisfied by speculation that the speech might threaten the Government’s interests. *Id.* at 1013 n.11. Instead, the Court required the Government to show actual evidence of “demonstrated ill effects” of employee acceptance of compensation for expressive activity. *Id.* at 1015. Here, there was no evidence of misconduct related to honoraria by the vast rank and file of federal employees.

The Court observed that the ban on honoraria was defended on the basis of actual or apparent abuses of honoraria by Members of Congress. *Id.* at 1016. It suggested that Congress might reasonably assume that payments of honoraria to judges or high ranking officials in the Executive Branch might generate a similar appearance of improper influence. The Court, however, refused to permit Congress to extend that assumption to the immense class of federal employees below grade GS–16.

The Court, further, placed little weight in the argument that a government-wide ban was necessary for administrative convenience. As it stated, a blanket burden of this magnitude requires a “much stronger justification” than the “dubious” claim of administrative convenience. *Id.* at 1017.

In short, the Court found the speculative benefits of the honoraria ban fell far short of the justification necessary to sustain this “crudely crafted” burden on employees’ freedom to engage in expressive activities. *Id.* at 1018. It therefore held the ban unconstitutional as applied to the parties before the Court—namely, the individually named plaintiffs, employees represented by the plaintiff unions, and a class of all Executive Branch employees paid at a rate below that of a GS–16.

In discussing the appropriate remedy, the majority declined to pass on the constitutionality of a ban limited to more senior government officials. As it stated, the Government “conceivably” might advance a different justification to support a more limited ban, which would then present different constitutional issues. *Id.* at 1019.

The Court further declined to redraft the statute to limit it to cases involving an undesirable nexus between the speaker’s official duties and either the subject matter of the speech or the identity of the pay or. This process, the Court warned, “would likely raise independent constitutional concerns.” *Id.* at 1019. It therefore left to Congress the task of drafting a narrower statute—subject, of course, to court review.

2. ANALYSIS OF H.R. 1639 IN LIGHT OF THE TEACHINGS OF THE SUPREME COURT IN U.S. V. NTEU

The Court’s decision instructs us, above all, that Congress is to tread very warily in attempting to restrict the expressive activity of career government employees. While the Court did not preclude the drafting of a narrower and more limited statute, it cautioned that such a statute must be based on considered congressional judgments, which should be founded, in turn, on evidence—not speculation—that it would counter demonstrated ill effects arising from the prohibited activity. The per-

ceived evil must therefore be carefully defined and documented and the legislation narrowly drafted to extend no further than the documented abuse.

With those principles in mind, let me turn to the provisions of H.R. 1639. That bill corrects many of the abuses of 501(b) but nevertheless still raises some concerns.

We are pleased that H.R. 1639 limits the blanket prohibition on acceptance of honoraria to Members of Congress and to senior, noncareer officers and employees of the government. It lifts the blanket prohibition for all other officers and employees and restricts their acceptance of compensation only for certain speeches, appearances, or articles that contravene a nexus test. While a distinct improvement over the original measure, there remain some concerns:

a. The bill itself is drafted in a negative fashion that may have a chilling effect—perhaps inadvertently—on federal employees. It is structured as a flat prohibition with certain listed exceptions for speech, of certain employees, that do not fail certain tests. It would be far clearer if the bill were framed as a narrow prohibition on the acceptance of any honoraria by Members of Congress and senior noncareer employees, coupled with a prohibition on acceptance of honoraria by other federal employees for appearances, speeches, or articles that, for example, involve the use of government time or resources. Employees could then be assured that all speech not specifically prohibited was permitted.

b. Sec. 501(b)(2)(A). We question whether any statutory restriction on the acceptance of compensation for work-related activity is necessary. These provisions are redundant, for there are already in place regulatory prohibitions on the acceptance of compensation by any executive branch employee for any activity that “conflicts with an employee’s official duties.” 5 C.F.R. 2635.802. The regulations further prohibit any activity that involves misuse of position, including the use of public office for private gain. *Id.* at 2635.701, *et seq.*

Federal statutes, moreover, prohibit receipt of compensation for government services or supplementation of salary from a private party. 18 U.S.C. 209 (1988 & Supp. IV 1992). There are similarly statutory prohibitions on solicitation or receipt of bribes. 18 U.S.C. 201(b) and (c).

Together, these regulatory and statutory provisions provide more than adequate safeguards against possible abuse of honoraria, conflict of interest, and misuse of government resources or nonpublic information. Significantly, there is no history of abuse by career government employees that had escaped correction by the already existing regulatory and statutory scheme. Nor is there any reason to believe that these provisions will cease to be effective.

If, and to the extent that, these provisions are not redundant, then they are constitutionally suspect because they single out expressive activity for disparate treatment. As such, they perpetuate some of the concerns raised by the blanket ban. As the Supreme Court stated, the imposition of “a greater burden on speech than on other off-duty activities assumed to pose the same threat to the efficiency of the federal service is, at best, anomalous.” *U.S. v. NTEU*, 115 S. Ct. at 1017.

c. Sec. 501(b)(2)(A)(i). The prohibition on acceptance of compensation for an appearance, speech, or article that relates “primarily to the responsibilities, policies, or programs of the agency or office in which the individual is employed” is dangerously vague and over broad. It could, for example, be interpreted to prohibit an editor with the Voice of America from accepting compensation for any article relating to American foreign policy, or an employee with the Department of Labor assigned to the Wage and Hour Division from accepting compensation for a speech on occupational safety and health. There is no justification for a ban of this breadth.

NTEU urges the redrafting of this language to limit it to appearances, speeches, or articles that relate primarily to the *employee’s own responsibilities*. Such language would be more narrowly tailored to the perceived evil, which we assume to be an employee’s supplementation of salary by accepting compensation from a non-government source for his or her government work. Other language in the proposed bill adequately addresses other, related evils that could possibly arise when a speech is based on agency operations, such as the use of nonpublic information.

d. Sec. 501(b)(2)(A)(ii). NTEU is concerned that a bar on honoraria when the “reason” for which the honorarium is paid is related to the employee’s official duties or status might prove to be a trap for the innocent. An employee might have no knowledge of a pay or’s “hidden agenda” and no reasonable basis for inferring that the pay or is improperly motivated. Such an employee should not be subjected to penalties if an unlawful motivation is later uncovered.

NTEU suggests that the language be modified to impose penalties on the acceptance of honoraria only when the employee has a reasonable basis for concluding that the honorarium is paid because of his or her official duties or status.

e. Sec. 501(b)(2)(D). Although the language of this provision is confusingly worded, NTEU reads this section as prohibiting any federal employee from accepting any fee over \$2000 for speech that is unrelated to government employment. If that is indeed the import of this section, NTEU has substantial constitutional concerns.

NTEU questions what governmental interest underlies a ceiling on the amount of compensation an employee can receive from expressive activities that have no nexus to federal employment. While most career federal employees will never earn close to \$2000 for an article, speech, or appearance, some certainly have that potential. They cannot constitutionally be deprived of money that they have legitimately earned from their expressive activities without a powerful countervailing interest, which is not present here.

During the litigation over the constitutionality of the ban, NTEU was approached by a number of federal employees who pursue a wide range of relatively lucrative expressive activities. One of these was a government lawyer named Lewis B. Puller, Jr., who won the Pulitzer Prize for his autobiography, *Fortunate Son*. He was asked to give speeches in his off-duty time about his book and his experiences during the Vietnam War; we understand that his earnings from some of these speeches exceeded this \$2000 limit (at a time when the monetary cap was not in effect). What right does the government have to say that this war hero and respected author cannot accept any fee that an audience is willing to pay, where there is no conflict of interest?

There can be no doubt, in the wake of *U.S. v. NTEU*, that a cap on the receipt of compensation for expressive activities burdens the First Amendment. The government has singled out expressive activity for a monetary restriction that it does not impose on other money-making activities. There is no federal restriction on the amount of compensation that an employee may receive for such moonlighting activity as a part-time job at McDonald's or an engagement singing at the Metropolitan Opera. Such activity raises the same "threat" to the efficiency of federal service as the receipt of compensation for articles, speeches and appearances—namely, none.

NTEU therefore urges this Subcommittee to eliminate the \$2000 cap on receipt of honoraria, at least with respect to career federal employees. We would not object to language limiting honoraria to "the usual and customary fee," as an additional safeguard against receipt of "sham" honoraria that is not legitimately earned by the employee. We do not, however, feel that such a provision is necessary, given the other statutory and regulatory safeguards against misuse of office and supplementation of salary.

f. Sec. 503(b). Because the prior notification requirements do not apply to career officers or employees, NTEU will not comment on this provision. We respectfully request the opportunity to supplement these comments to set forth constitutionally based concerns should this Subcommittee decide to extend the notification requirements to career officers and employees.

I thank the Subcommittee for this opportunity to submit these comments on proposed amendments to the Ethics in Government Act.

Mr. GOODLATTE [presiding]. Thank you, Mr. Tobias.

And now we'll hear from Mr. Simon.

STATEMENT OF DONALD J. SIMON, EXECUTIVE VICE PRESIDENT AND COUNSEL, COMMON CAUSE

Mr. SIMON. Thank you, Mr. Chairman. I appreciate the opportunity to testify on behalf of Common Cause regarding legislation dealing with the acceptance of honoraria by Federal officials in the three branches of government. Common Cause has worked on this issue for many years. We have long taken the position that public officials should serve only one employer, the American public. Conflicts of interest or the appearance of conflicts potentially arise when individuals entrusted with public service accept fees from private interests.

The honoraria fee system prior to the Ethics Reform Act of 1989 had become a pernicious vehicle for private interests to make influence payments to public officials, payments that went directly to the official's personal financial benefit. Common Cause strongly supported and worked for passage of the ethics pay increase pack-

age adopted in 1989. The effort resulted in the end of the discredited system by which Members of Congress and other Federal officials received outside honoraria from private interests.

Last year in the *NTEU* case, the Supreme Court found that, as applied to low- and mid-level executive branch employees, the flat honoraria ban did not meet constitutional muster. However, the Court's opinion left intact the flat ban for top government officials in all three branches. The Court makes clear, I believe, that a flat ban on honoraria for such high-level officials does serve the compelling purpose of deterring the threat of corruption.

In a recent decision by Assistant Attorney General Dellinger, however, the Justice Department has now nullified the entire law. The Department has concluded that the impermissible ban on low- and mid-level executive branch employees cannot be severed from the remainder of the ban, and that the Court's ruling, therefore, effectively eviscerated the entire statute.

The Justice Department's decision not to enforce the statutory ban on honoraria for any officials, including high-level officials, makes congressional action now essential for three reasons: first, to ensure that there is a flat honoraria ban for high-level executive and judicial branch officials; second, to ensure that the honoraria ban for Members of Congress is statutory, and, third, to provide a reasonable statutory test to protect against potential conflicts of interest for middle- and lower-level federal employees in all three branches.

As I stated previously, we believe that high-level officials in all three branches, including Members of Congress, top-level congressional staff, judges, and high-ranking executive branch officials, should be subject to a flat statutory ban on the acceptance of any honoraria, in order to assure against abuses involving any of these key officials. The determination of who falls within the ranks of high-level officials should be made on the basis of salary level.

Under the Supreme Court's ruling, a similar flat ban for middle- and lower-level officials is not permissible. However, we believe the acceptance of honoraria by this group of Federal employees should not be permitted where either a conflict of interest or the appearance of a conflict may occur. Under H.R. 1639, such middle- and lower-level Federal employees would be allowed to accept honoraria fees of up to \$2,000 per activity if the activity meets a three-pronged test to ensure that the acceptance of the honoraria would not create such a conflict of interest. This test is based on whether there is a clear nexus between the employee's activities and responsibilities as a Federal employee on the one hand and the circumstances under which the honoraria is offered on the other. All three parts of the test are essential, and we believe such a nexus test would be permitted under the *NTEU* ruling.

Finally, I just want to mention that we believe effective oversight and enforcement is also essential. In order for this case-by-case approach for middle- and lower-level employees to work, there must be a commitment to carefully oversee the honoraria activities that occur and to require public disclosure. The provisions in H.R. 1639 that require prior notification for the acceptance of honoraria in certain situations is an important enforcement mechanism and should be included in the subcommittee's bill.

Thank you very much.

[The prepared statement of Mr. Simon follows:]

PREPARED STATEMENT OF DONALD J. SIMON, EXECUTIVE VICE PRESIDENT AND
COUNSEL, COMMON CAUSE

Mr. Chairman and Members of the Committee, I appreciate the opportunity to testify on behalf of Common Cause regarding legislation dealing with the acceptance of honoraria by federal officials in the three branches of government.

Common Cause has worked on this issue for many years. We have long taken the position that public officials should serve only one employer—the American public. Conflicts of interest or the appearance of such conflicts potentially arise when individuals entrusted with public service accept private fees.

Full-time public officials and employees should be adequately compensated by the public they serve, and that they should not be in paid relationships with private interests. As the U.S. Supreme Court recognized in upholding restrictions on public employees' outside income in *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 549 (1961):

The moral principle upon which the statute is based has its foundation in the Biblical admonition that no man may serve two masters, Matt 6:24, a maxim which is especially pertinent if one of the masters happens to be economic self-interest. Consonant with this salutary moral purpose, Congress has drafted a statute which speaks in very comprehensive terms.

Common Cause strongly supported and worked for passage of the ethics-pay package adopted in 1989, and for its subsequent expansion to the Senate. That effort resulted in the end of the wholly discredited system by which Members of Congress received outside honoraria from private interests. It also provided a substantial salary increase to Members of Congress, reflecting the nature and importance of Members' responsibilities and role in society.

Furthermore, since the 102nd Congress, we have supported legislation which would allow middle- and lower-level federal employees to accept honoraria if the acceptance of that honoraria does not pose conflict-of-interest problems. We have also continued to strongly support the total ban on honoraria for high-level government officials in all three branches—Members of Congress and high-level congressional staff, federal judges and top executive branch officials.

The recent decision by Assistant Attorney General Walter Dellinger to nullify the 1989 honoraria ban in its entirety has substantially heightened the urgency for swift congressional action on this matter. Failure to act would risk the reemergence of an honoraria system that would again undermine public confidence in government because of the real and perceived conflicts of interest that would result.

Therefore, we strongly urge the Subcommittee to move swiftly to report out legislation to ensure that there is a statutory flat honoraria ban for Members of Congress and high-level congressional staff, federal judges, and top executive branch officials. We urge the Subcommittee to pass the provisions of H.R. 1639, the Ethics in Government Act Amendments of 1995, introduced by Representative Barney Frank (D-MA), providing an exemption from the flat ban for middle- and lower-ranking federal employees under certain specified circumstances. Similar legislation has been introduced in the Senate in the last two Congresses, led by Senators John Glenn (DOH) and William Roth (R-DE).

The House Judiciary Committee and the House leadership should ensure that the House acts on legislation that responds appropriately to the Supreme Court ruling while providing for a statutory ban on honoraria fees for top government officials. Failure to act on such legislation this year threatens to once again open the door to the same abuses that had been eliminated in the 1989 law.

THE BACKGROUND OF THE HONORARIA LEGISLATION

The honoraria fee system, prior to the Ethics Reform Act of 1989 and the subsequent Senate action to ban honoraria, had become a pernicious vehicle for private interests to make influence payments to public officials, payments that went directly to the public official's personal financial benefit. Used to buy access and influence, the honoraria fees were described in editorials in newspapers across the country in such terms as "legalized bribery," "shameless pandering to special-interest payoffs," "bag money," "lobbyist payola," and a "low-life practice."

The 1989 ethics act which banned honoraria fees to federal officials and employees in all three branches of government was the culmination of many years of effort to end the problems posed by the corrupt honoraria system in Congress, while also

ensuring appropriate pay levels for Members of Congress. The flat honoraria ban for all government personnel was based on recommendations by the 1988 Commission on Official Compensation ("Quadrennial Commission"), President George Bush's Ethics Commission, and the House Bipartisan Task Force on Ethics. The legislation also included other important ethics provisions, for example, (1) strengthening post employment restrictions for federal employees, (2) extending, for the first time, revolving door restrictions to Members of Congress and high-level congressional staff, and (3) new restrictions on Members' outside earned income.

When the honoraria ban was challenged in the courts, Common Cause participated in the litigation as an *amicus curiae* in support of the flat honoraria ban. As I mentioned earlier, we also supported legislative efforts to modify the flat ban for middle- and lower-ranking federal employees while protecting against potential conflicts of interest.

Last year in *National Treasury Employees Union v. United States*, 115 S. Ct. 1003 (1995) the Supreme Court found that, as applied to low- and mid-level executive branch employees, the flat honoraria ban did not meet constitutional muster. The Court found no evidence of misconduct related to honoraria paid to federal officials below grade GS-16, and therefore concluded that the flat honoraria ban for such employees was an overly broad restriction on their First Amendment rights.

However, the Court's opinion left intact the flat honoraria ban for the top government officials in all three branches. The Court makes clear that a flat ban on honoraria for such high level officials does serve the compelling purpose of deterring the threat of corruption. The Court noted that "abuses" of honoraria by Members of Congress created an "appearance of improper influence." Congress "reasonably could assume" that payments of honoraria to judges or high-ranking executive branch officials would result in a similar appearance problem.

In a recent decision by Assistant Attorney General Dellinger, however, the Justice Department has now nullified the entire law. The Department has concluded that the impermissible ban on low- and mid-level employees cannot be severed from the remainder of the ban, and that the Court's ruling therefore "effectively eviscerated" the entire statute.

The Justice Department's decision not to enforce the statutory ban on honoraria for any officials, including high-level officials, makes congressional action now essential for three reasons: first, to ensure that there is flat honoraria ban on high-level executive and judicial branch officials; second, to ensure that the honoraria ban for Members of Congress is statutory, and third, to provide a reasonable statutory test to protect against potential conflicts of interest for middle- and lower-ranking federal employees.

A STATUTORY BAN FOR HIGH-LEVEL GOVERNMENT OFFICIALS

As I stated previously, we believe that high-level officials in the three branches of government, including Members of Congress, top-level congressional staff, judges, and top-level executive officials, should be subject to a statutory ban on the acceptance of any honoraria in order to assure against abuses involving any of these key officials. The determination of who falls within the ranks of "high-level officials" should be made on the basis of salary level.

Over the years, government ethics laws and rules have recognized that those who serve in the most important positions in government and who bear the greatest responsibilities should be held to and should maintain the highest ethical standards. Questions raised about the activities of influential federal officials and employees in all three branches of government can have a serious impact on the public's trust in government. This principle has been reflected in executive branch orders barring private outside earned income for executive branch political appointees and is also reflected in various provisions of ethics laws that have applied to high-level government officials.

High-level government officials, including senior congressional staff, have extensive responsibilities that determine the direction of the federal government. These high-level officials are of particular importance to private interests hoping to influence the government.

For example, concern about the payment of honoraria fees to senior congressional staff was a public issue at the time that the flat honoraria ban was enacted. Newspaper reports chronicled thousands of dollars of honoraria payments to top aides of the House Speaker and of the House Minority Leader from contractors, engineers and a clothing manufacturer; thousands of honoraria dollars to a tax committee staff director from groups affected by the tax reform being considered in Congress; and similar sums to the aide of a Banking Committee Member. It is hard to imagine many circumstances where a party making an honoraria payment to a professional

staff member of the House Ways and Means Committee or the Senate Finance Committee, or to the top staff aide of a Member of Congress, would not have some interest that could be affected by that staff member's performance of his or her official duties.

It is critically important that the ban on honoraria be statutory for two reasons. First, a violation of a statute is a serious matter, subject to enforcement by the Justice Department. This fact helps improve compliance.

Second, House and Senate rules are more easily changed than law. We have seen specific examples in the past where Congress acted on the honoraria issue and then, when the public spotlight had receded, reversed itself. This happened in 1979 when the Senate, in a surprise move, voted to postpone for four years new limits on outside earned income and new limits on honoraria that had been enacted in 1977 and were scheduled to take effect in 1979. The postponement vote took place on short notice, on an unrecorded voice vote, after five minutes' debate with six Senators present in the chamber at the time of the vote. Efforts to revisit the issue weeks later failed.

For these reasons, we urge the Subcommittee to ensure that the honoraria ban for high-level government officials is statutory.

A CONFLICT-OF-INTEREST TEST FOR MIDDLE- AND LOWER-LEVEL FEDERAL EMPLOYEES

Under the Supreme Court's ruling, a flat ban on honoraria for middle- and lower-level federal officials is not permissible. However, we believe the acceptance of honoraria by this group of federal employees should be subject to an honoraria ban in situations where either a conflict of interest or the appearance of a conflict may occur. These mid- and lower-level officials should also be subject to an overall limit of \$2,000 in honoraria from any single source, the limit in effect prior to the 1989 Ethics Act.

Under H.R. 1639, middle- and lower-level federal employees, defined as those earning less than \$108,000 annually, would be allowed to accept honoraria fees of up to \$2,000 per activity, if the activity met the following three-pronged test to ensure that receipt of the honoraria would not create a conflict of interest or the appearance of a conflict of interest.

This three-prong test in H.R. 1639 is:

- the purpose of the appearance, or the subject of the speech or article, does not relate primarily to the individual's official duties;

- the reason for which the honoraria is offered is not related to the individual's official duties or status as a federal employee; and,

- the person offering the honorarium has no interests that may be substantially affected by the performance or nonperformance of the individual's official duties.

This test for determining whether a potential conflict of interest exists is based on a clear nexus between the employee's activities and responsibilities as a federal employee on the one hand, and the circumstances under which the honoraria is offered, on the other.

All three parts of the test are essential. In particular, the third part of this test—that the person offering the honorarium has no interests that may be substantially affected by the performance or nonperformance of the individual's official duties—is a key element.

Prohibiting an honorarium from a conflicting source helps prevent efforts to evade the restrictions. For example, a person with business before a specific agency might discover that the federal employee dealing with his company is very knowledgeable about coin collecting. The business person, who also collects coins, seeks to get in the good graces of the federal employee by getting an honorarium to that federal employee. He might ask the federal employee to come to his coin club and speak on that subject and get an honorarium. The claim would be that it passes the first two parts of the test—the purpose was unrelated to the federal employee's official duties and that federal employee was asked because of his or her expertise on the subject. Yet, the end result is that the business person has provided a substantial favor to the federal employee while having business that could be affected by that federal employee's performance of his or her official duties. Inclusion of the third prong of the test would prevent this sort of evasion of the purpose behind the law.

We urge you to adopt this three-prong conflict-of-interest test.

EFFECTIVE OVERSIGHT AND ENFORCEMENT

Effective oversight and enforcement is central to the effectiveness of any ethics laws and standards. Appropriate oversight and enforcement must be enacted with respect to the honoraria accepted by middle- and lower-level federal officials.

For example, Congress has had a questionable record at best over the years in this area. In order for the case-by-case approach to restricting honoraria to middle and lower-level officials to work, there must be a commitment to carefully oversee the activities that occur.

The provisions in H.R. 1639 requiring prior notification for the acceptance of honoraria is an important enforcement mechanism, and should be included in the Subcommittee's bill. Further, the Subcommittee should ensure that the entity so notified be required, by statute, to monitor and review the honoraria reports that are filed to ensure that the law has been complied with.

We also urge the Subcommittee to consider a public disclosure requirement. Public disclosure is often a key factor in assuring that ethics rules are met. We recommend the Subcommittee consider requiring by statute that the ethics oversight and enforcement bodies must make periodic public reports that disclose the number of honoraria fees being paid, the amounts involved, the kinds of honoraria payments being received and other information relevant to the way in which the three-prong test is being met.

These measures will help ensure that the honoraria provisions are being interpreted as intended and will inform the public about the kind of honoraria payments being made to government officials.

LOBBY REFORM

Because the Subcommittee is also looking at proposed revisions in the lobby disclosure act, I want to note Common Cause's strong view that any measure which seeks to modify the recently passed act must include provisions to include meaningful disclosure of major grassroots lobbying activities. Grassroots lobbying is one of the fastest growing means used to influence government. However, despite the enormous amounts of money spent by lobbying organizations on grassroots lobbying campaigns, these costs are rarely disclosed and will likely continue to be undisclosed under the new law.

We believe all grassroots lobbying should be disclosed, but at a minimum, the new law should be strengthened to require disclosure of the new breed of grassroots lobbying in Washington known as "astroturf" lobbying. "Astroturf" lobbying refers to individuals or groups who often do not themselves directly lobby, but act as "hired guns" to generate pressure from home. According to a March 27, 1993 article in *National Journal*, "[T]hese grass-roots consultants are often the last line of defense [for their clients], called in when other lobbying, advertising and public relations efforts have been exhausted," sometimes for fees described as running more than \$1 million per project.

A grassroots disclosure provision was included in the Levin-Cohen substitute offered when the Senate first took up the lobby disclosure bill last year. This provision would define lobbying activities to include paid efforts by the employees or contractors of a person who is otherwise required to register, to stimulate grassroots communications of lobbying contacts by registered lobbyists. This provision would ensure that these huge, expensive and influential "astroturf" efforts do not remain hidden from public view.

CONCLUSION

Action on legislation to provide for a conflict-of-interest test for the acceptance of honoraria payment for middle- and lower-level federal employees has unfortunately been blocked in the last two Congresses. The Supreme Court's ruling and Justice Department's recent action now makes congressional action imperative.

We understand that changes will also need to be made in the rules of the House and the Senate. That should not, however, keep this Subcommittee and the full Committee from moving forward. It does mean that the House leadership must give House action on this issue a high priority.

We strongly urge this Subcommittee to report out expeditiously a bill that ensures high-level officials in all three branches remain covered by the flat honoraria ban and that middle- and lower-level officials are covered by a conflict-of-interest test. We also urge you to push for quick action by the full Committee and by the full House.

Thank you again for the opportunity to testify.

Mr. GOODLATTE. Thank you, Mr. Simon.

Mr. Thompson.

**STATEMENT OF BRENT THOMPSON, EXECUTIVE DIRECTOR,
FAIR GOVERNMENT FOUNDATION**

Mr. THOMPSON. Thank you, Mr. Chairman, members of the committee. I don't think our position on this differs terribly from Common Cause, which I think is refreshing.

A couple of things we haven't talked about today that I'd like to comment on, are the implications of this whole affair, as well as Mr. Dellinger's memorandum, which we find somewhat puzzling.

First off, the DOJ opinion declaring the ban unenforceable, is puzzling, as we do not believe it was compelled by law or other policy considerations. The Justice Department concluded that section 501 was "effectively eviscerated," and, thus, did not survive the Supreme Court's ruling in *NTEU*. The Supreme Court reached an opposite result, however. *NTEU*, as we know, invalidated only that part of the act related to lower-level Federal employees.

The DOJ memorandum fails to distinguish between whether the remaining core of the provision is unenforceable as a matter of law or whether it should not be enforced as a matter of policy. As to the former, DOJ does not offer any analysis demonstrating why it is legally barred from enforcing the remaining 501(b).

As a basis for its decision to halt further enforcement, DOJ cites principles and rules of practice relating to severability and the practical and prudential limitations on courts in giving affect to statutes, significant portions of which have been deemed unconstitutional. The DOJ analysis seems strangely misplaced. DOJ asks whether "any remaining applications of 501(b) survive the *NTEU* decision." The question, however, was answered affirmatively by the Supreme Court. The Court did not consider and did not find 501(b) unconstitutional in relation to members, judges, and senior-level employees. Standing on its own, therefore, we do not see that *NTEU* compelled the DOJ's conclusion.

It does not follow from the DOJ analysis, furthermore, that the Justice Department is compelled to cease further enforcement of the ban against the remaining employees. The proffered severability analysis, after all, was not raised by the Supreme Court, as the Court declined invalidating the full sweep of the act.

DOJ's severability analysis as it relates to the courts' duties and courts' obligations is in any case unconvincing. The DOJ cites the "final test of severability" as laid out in the *Alaska Airlines* case, yet skipped over the "standard test for determining severability of an unconstitutional provision: Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operational."

Well, we suggest that, the remaining provisions are fully operational, and, therefore, it was unnecessary for the Justice Department to conclude that the entire 501(b) is unenforceable.

Turning to the matter of legislation, we do support remedial legislation that would revive the honoraria ban in instances involving a clear employment nexus. Mr. Frank's bill, H.R. 1639, appears to strike a reasonable balance between the rights of employees to exercise their first amendment freedoms and the needs of the Federal Government as employer to ensure order in the workplace and avoid appearances of impropriety.

We note that the three-step analysis in the Frank measure is a streamlined version of the prior regulatory scheme under which honoraria was permissible so long as an employee could answer each of five questions in the negative. We're convinced that the prior scheme and H.R. 1639 focus on the correct and necessary considerations.

I'd like to just make a couple of points which this affair has implications for, and that is with respect to good government initiatives generally. We believe that the honoraria ban experience does hold lessons for future good government legislation. In the rush to pass tough ethics standards, the Congress gave short shrift to legitimate first amendment considerations, which ultimately proved fatal. Now we're having to revisit this issue and, presumably, move forward with corrective legislation.

As the High Court has recognized, Congress can legitimately conclude that the avoidance of the appearance of impropriety is critical if confidence in the system of representative government is not to be eroded. However, Congress must do more than simply posit the existence of a disease sought to be cured; it must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will, in fact, alleviate these harms in a direct and material way. And it was this analysis in the *NTEU* court that ultimately proved fatal. In fact, the Government had not demonstrated a compelling need for the blanket ban, and that was its ultimate undoing.

Before moving forward with additional laws that implicate first amendment liberties, Congress may wish to first evaluate whether prior efforts to address appearances of impropriety have alleviated harms in a direct and material way. And in our testimony we suggest at least one measure is looking at the public opinion polls with regard to Congress. Of course, people's confidence in Congress, their view of Congress, is frequently discussed as legislation of this type is considered; it's a legitimate consideration. People have to have trust in their government.

One question for us is: is there a correlation between prior efforts and the favorability ratings of Congress. We have attached to our testimony 22 years' worth of ABC News, Washington Post polls which suggest to us that there is not, in fact, a correlation between the passage of good government legislation and how the public perceives Congress. The 104th Congress is a case in point. This Congress has been one of the most prolific reform Congresses in memory, having passed far-reaching congressional reforms, as well as a gift ban and a lobbying regulation measure, which this committee obviously had much to do with; yet, the approval rating of the 104th Congress has dropped steadily and dramatically since the opening gavel. We would simply urge Congress not to accept at face value boilerplate claims that proposals are necessary to address appearances of impropriety. When it comes to good government reform, moreover, most of what should have been done has been done.

Thank you. I'd be happy to answer any questions.

[The prepared statement of Mr. Thompson follows:]

PREPARED STATEMENT OF BRENT THOMPSON, EXECUTIVE DIRECTOR, FAIR
GOVERNMENT FOUNDATION

Mr. Chairman and Members of the Subcommittee, my name is Brent Thompson and I am executive director of the Fair Government Foundation, a non-profit, non-partisan organization that undertakes research and public education in the area of political action, campaign finance and government ethics. Thank you for inviting me to testify.

The issue for the Committee is whether in light of the Supreme Court's decision in *U.S. v. National Treasury Employees Union*, 115 S. Ct. 1003 (1995) ("NTEU"), and the Department of Justice's conclusion that Section 501 (b) of the Ethics in Government Act "simply cannot stand,"¹ remedial legislation is necessary.

We agree that there is little to demonstrate "that paying lower-level employees for speech entirely unrelated to their work jeopardizes the efficiency of the entire federal service" or materially contributes to the "appearance of impropriety." NTEU at 1018. For that reason, we believe Congress should consider legislation that would revive the honoraria ban, limited, however, to cases involving a clear employment nexus.

I. THE ORIGINAL HONORARIA BAN WAS A MISTAKE

Section 501(b) was a careless policy-making exercise. We now know that Congress was insufficiently sensitive to legitimate First Amendment concerns or fundamental fairness to federal employees. The blanket ban was not supported by substantial compelling evidence of abuse "[T]he government cite[d] no evidence of misconduct related to honoraria in the vast rank and file of federal employees below Grade GS-16." NTEU at 1016 The "honoraria ban's dubious application . . . to all Executive Branch employees below Grade GS-16" was simply unnecessary to achieve the goal of preventing actual or apparent improprieties. NTEU at 1018.

That lower level executive branch employees were included in the blanket ban is curious. The thrust of the ban was clearly aimed at members of Congress and at certain isolated abuses by congressional staff. See 990 F.2d at 1278 (lower court opinion). The complete ban, moreover, was the means by which Congress felt (politically) able to adopt a substantial pay raise for members, judges and senior-level executive employees.

The honoraria ban, as it related to members of Congress and their staff, was a real and reasonable improvement in public policy. With respect to lower level executive branch employees, however, it was not.

II. DOJ'S DECISION TO CEASE ENFORCEMENT OF SECTION 501(B) IS NOT COMPELLED BY LAW

The DOJ decision declaring the ban unenforceable in toto is puzzling, as we do not believe it was compelled by law or other policy considerations. The Justice Department concluded that Section 501(b) was "effectively eviscerated" and thus did not survive the Supreme Court's ruling in NTEU. Dellinger Memo at 7. The Supreme Court reached the opposite result, however. NTEU invalidated only that part of the Act relating to *lower-level executive branch employees*, leaving in place the ban for federal judges, members of Congress and high-level executive employees.

The DOJ memorandum fails to distinguish between whether the remaining core of the provision is unenforceable as a matter of law or whether it should not be enforced as a matter of policy. As to the former, DOJ does not offer any analysis demonstrating why it is legally barred from enforcing the remaining 501(b).

As the basis for its decision to halt further enforcement, DOJ cites principles and rules of practice relating to severability and the practical and prudential limitations on courts in giving affect to a statute, significant portions of which having been deemed unconstitutional. The DOJ analysis seems strangely misplaced. DOJ asks whether "any remaining applications of 501(b) . . . survive the NTEU decision." Dellinger Memo at 4. That question, however, was answered affirmatively by the Supreme Court. The Court did not consider and did not find 501(b) unconstitutional in relation to members, judges and senior-level executive employees. Standing on its own, therefore, NTEU does not compel the DOJ conclusion.

It does not follow from DOJ's analysis, furthermore, that the Justice Department is compelled to cease further enforcement of the ban against the remaining employ-

¹Legality of Government Honoraria Ban Following *U.S. v. National Treasury Employees Union*, Memorandum of Walter Dellinger, Assistant Attorney General (Feb. 26, 1996) ("Dellinger Memo") at 7.

ees.² The proffered severability analysis, after all, was not raised by the Supreme Court, as the Court declined invalidating the full sweep of Section 501(b).³ DOJ has not answered why it should be bound in this matter by Supreme Court precedent and canons of statutory construction that the *Supreme Court* concluded were not applicable in the *NTEU* case.

DOJ's severability analysis as it relates to the "courts' 'duty'" and the "courts' 'obligation,'" is in any case unconvincing. Dellinger Memo at 4 and 5. The DOJ cites the "final test of severability" as laid out in *Alaska Airlines, Inc. v. Brook*, 480 U.S. 678 (1987), yet skips over "[t]he standard test for determining severability of an unconstitutional provision [which] is well established."

Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operational.

Alaska Airlines at 684 (quoting *Buckley v. Valeo*, 424 U.S. 1, 108) (1976) (per curiam) (quoting *Champlin Refining Co., Inc. v. Corporation Comm'n of Oklahoma*, 286 U.S. 210, 234 (1932)).

While concededly the Court's construction "reduce[d] the group affected [by the ban] many fold[sic]," there can be no dispute that the "surviving core" is fully operational. Dellinger Memo at 5 and 6. The *Alaska Airlines* "standard test" has been met.

DOJ is simply wrong, moreover, to argue that the statute, after *NTEU*, because of its diminished scope, "is not one traceable to congressional intent" Dellinger Memo at 6. It might have been true had the Court, as the dissent had urged, limited its holding to honoraria payments not involving an employment nexus. It did not. The resulting core of the Section 501 (b), contrary to DOJ, is clearly and precisely traceable to Congress. Congress enacted a blanket ban on all government employees. What's left is a blanket ban on all government employees except those below GS-16. As to each class of employees subject to the ban, Congress intended to include them in a blanket ban. That the honoraria ban as to some of its targets is contrary to the First Amendment in no way changes the character or intent of the ban as to the remaining targets. Congress ordered a pie, what remains after *NTEU* is not a cake, as DOJ seems to believe, but a portion of a pie.

It would thus appear that DOJ has made a policy decision, *sua sponte*, not to enforce 501(b). Whether that decision comports with the will of Congress is matter for you and your colleagues.

III. CONGRESS SHOULD CONSIDER REMEDIAL LEGISLATION THAT REVIVES THE HONORARIA BAN ONLY IN INSTANCES INVOLVING A CLEAR EMPLOYMENT NEXUS.

The Court in *NTEU* rightly declined to engage in "judicial legislation" and graft an employment nexus onto its holding. To do so would have left "an entirely different statute from the one Congress intended to enact." Dellinger Memo at 5. Because of the significant First Amendment issues at stake, as well as the fundamental unfairness of a blanket ban, Congress should craft a narrowly tailored ban that focuses on circumstances involving an employment nexus.

Although the DOJ invalidation of Section 501(b) might appear to throw the door wide open for conduct that can give rise to improper appearances—and even actual corruption—there remains a web of statutory and regulatory provisions regulating, in part, such conduct. See 5 C.F.R. Sec. 2635.807 (limiting honoraria for teaching, speaking and writing that relates to official duties); Sec. 2636.301 *et seq.* (concerning limitations on outside income); Exec. Order 12674 (concerning outside income for presidential appointees). Senate and House rules, furthermore, continue in effect for members, officers and employees of the Congress. See Senate Rule 36⁴ and House Rule 47. These provisions appear to diminish the immediate, practical consequences of the DOJ action, though not eliminating the need for legislation.⁵

²It is anomalous that the Government urged the Court to uphold the ban on all employees not party to elk case (members, judges and senior-level employees) and "to situations in which a nexus is present," *NTEU* at 1018, yet on the heels of the *NTEU* decision, declared the statute "effectively eviscerated." Dellinger Memo at 7.

³The Court in fact *overtuned* the court of appeals result, which had invalidated the ban as applied to all executive branch employees. *NTEU* at 1018.

⁴Senate Rule 36 incorporates by reference Section 501 of the Ethics in Government Act of 1989.

⁵It's been suggested that 18 U.S.C. 209, relating to the payment of salary to executive branch personnel by sources other than the United States Government, effectively bans receipt of honoraria in circumstances involving an employment nexus. We are not aware, however, of any case law interpreting the section to encompass honoraria payments. As a criminal statute, it could certainly be subject to challenge on vagueness grounds. On its face, the statute would not, in

Part of the rationale underlying the blanket ban was evidently the desire to eliminate the costs of administration in making case-by-case determinations. Administrability is no doubt a legitimate matter than should receive considerable forethought before any legislation is adopted. Standards should be drafted with a level of simplicity and clarity so that rank and file federal employees, with a minimum of guidance, can understand their limitations. An "infinitely filigreed statute" dealing with "every subtle distinction between various groups of employees" is unnecessary and should be avoided. *NTEU* at 1029 (Rehnquist, C.J., dissenting).

Mr. Frank's measure, H.R. 1639, appears to strike a reasonable balance between the rights of employees to exercise their First Amendment freedoms and the needs of the federal government as employer to ensure order in the workplace and to avoid appearances of impropriety. We note that the three step analysis proposed by H.R. 1639 is a streamlined version of the prior regulatory scheme under which honoraria was permissible so long as an employee could answer each of five questions in the negative. See *NTEU* at 1011, n. 7. We are convinced that the prior scheme as well as H.R. 1639 focus on the correct and necessary considerations.

IV. HONORARIA BAN SHOULD TEMPER FUTURE "GOOD GOVERNMENT" INITIATIVES

We believe that the honoraria ban experience holds lessons for fixture consideration of "good government" legislation. In the rush to pass "tough" ethics standards, the Congress gave short shrift to legitimate First Amendment considerations, which ultimately proved fatal.

Preventing the appearance of corruption and impropriety has become the boilerplate justification for most of the "good government" provisions that have been proposed and that are currently on the books. As the high court has long recognized, Congress can "legitimately conclude that the avoidance of the appearance [of impropriety] 'is also critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent.'" *Buckley v. Valeo*, 424 U.S. 1, 29 (1976) (quoting *CSC v. Letter Carriers*, 413 U.S. 548, 565 (1973)). Congress, however, "must do more than simply 'posit the existence of the disease sought to be cured.' . . . It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *NTEU* at 1014 (quoting *Turner Broadcasting System v. FCC*, 114 S. Ct. 2445, 2450 (1994)).

Before moving forward with additional laws that implicate First Amendment liberties, Congress may wish to first evaluate whether prior efforts to address "appearances of impropriety" have alleviated "harms in a direct and material way." *Id.* One measure that might cast light on the success or failure of prior legislation is the approval rating of Congress. While public opinion polls are clearly imperfect empirical tools, there are now, if any, alternatives.

A cursory review of polling data from 1974 to the present paints a muddled picture. Over the 22-year measurement period, Congress has seen an approval rating as high as 56 percent and as low as 17 percent. See Attachment A. The most recent low of 18 percent was in October 1994 and the most recent high, 42 percent, occurred in January 1995. What's striking is that there seems to be no correlation between passage of legislation aimed at addressing perceptions of impropriety and favorable public opinion of Congress.

Indeed, the 104th Congress is a case in point. This Congress has been one of the most prolific reform congresses in memory, having passed far-reaching congressional reforms, as well as a gift ban and a lobbying regulation measure. The approval rating of the 104th Congress, however, has dropped steadily and dramatically since the opening gavel.

We would simply urge Congress, therefore, not to accept at face value boilerplate claims that proposals are necessary to address "appearances of impropriety." Too often those advocating the proposal are working to make the claim self-fulfilling, and the proposals themselves are of questionable likely impact. When it comes to good government reform, moreover, most of what should have been done, has been done.

CONCLUSION

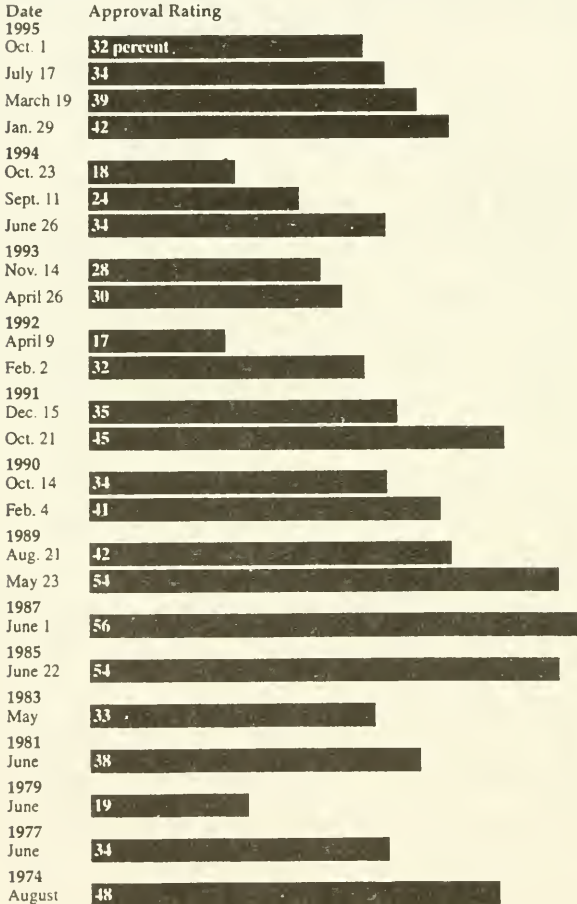
Modest steps to prevent corruption in the federal employment ranks are desirable. In light of the *NTEU* decision, Congress should thus move forward with legislation reviving the ban on honoraria payments that have a reasonable employment nexus.

our opinion, provide fair notice as to the conduct it prohibits. Section 209, therefore, does not appear to obviate the need for legislation.

ROLL CALL

Congress in the Polls

A new survey by ABC News and the Washington Post shows Congressional approval ratings slipping again after a brief upsurge earlier this year. Here's a run-down of ABC News and Gallup surveys over the last 22 years:



Mr. GOODLATTE. Thank you, Mr. Thompson.

I suppose that Members of Congress are concerned, and perhaps should be concerned, about their approval ratings, but when you say that we should evaluate prior efforts to address the appearance of impropriety before moving to further ones, are you suggesting that there have been some that we have passed that are inappropriate because, in addition to perception, we also have to deal with what is right and wrong? And if it appropriate to have taken some of the reforms we've taken, then regardless of whether it changes the public's attitude toward the Congress, I think it's appropriate for us to do it. Would you cite some that you think we should not have taken?

Mr. THOMPSON. Well, I think the case in point or the current case is an indication that the honoraria ban was too broad and was unnecessary, and ultimately proved to be a violation of the first amendment. This is not the first time. We know that, for instance, the original campaign finance reform legislation, much of it was similarly deemed unconstitutional and has served as the basis for much of the first amendment analysis that applies to the *NTEU* case and others.

As I indicated in my final comment, at some point it seems to us that the road needs to end somewhere. At some point there are diminishing returns that come from more and more so-called reform legislation. And much of what has been adopted, or what should have been adopted, as I suggested in my remarks, has been adopted.

Mr. GOODLATTE. Thank you.

Mr. Simon, do you have any comments on that same issue? I think there's a valid point. For example, in 1974 some of the reforms that were enacted for campaign finance are now the target of new proposals for campaign finance reform and may well be deserving of further reform, but—the case is made.

Mr. SIMON. Well, Mr. Thompson says that the road needs to end somewhere. I suggest the road needs to end when the problems are adequately addressed, and they have not yet been adequately addressed.

As I'm sure you know, Common Cause believes that there are substantial problems remaining regarding the issue of money and politics and the role of money in Washington and the influence of money in Congress, and that further reform of the campaign finance laws is required. And that directly does relate to public confidence in government and the perception that the public has about how government works.

We support bipartisan efforts pending in both the House and the Senate in this Congress to provide further reforms of the campaign finance system. And although the reforms enacted in this Congress relating to the gift ban and relating to the lobby disclosure laws are very welcome reforms and I think are long overdue—and we have applauded the Congress for taking these steps—the real problems are not going to be fully addressed until there is further reform of the campaign finance system.

Mr. GOODLATTE. Did Common Cause support the 1974 reforms?

Mr. SIMON. We did.

Mr. GOODLATTE. And what is your assessment of those now, since you're calling for, as I understand it, the repeal of some of those reforms?

Mr. SIMON. Well, those reforms need additional work. New problems have arisen, and those new problems need to be addressed. As Mr. Thompson indicated, the original 1974 law was partially invalidated in the *Buckley* case in 1976. Additional problems have arisen in the intervening 20 years, and—

Mr. GOODLATTE. But aren't some of those related to the reforms enacted? I believe that you favor the repeal of political action committee contributions, for example?

Mr. SIMON. We support the legislation, as I said, the bipartisan bills which further restrict PAC contributions; that's correct.

Mr. GOODLATTE. Those were created as a result of the earlier reforms.

Mr. SIMON. No, actually, I disagree with that. PAC's had existed long before the 1974 laws. There were reforms, there were measures in the 1974 reform law which were not supported by Common Cause and other reform groups, but, nonetheless, were put in the 1974 law, which contributed to the further growth of PAC's, but PAC's were not created as an initial matter.

Mr. GOODLATTE. Substantial, very substantial.

Mr. SIMON. Substantial growth, and that's one of the problems that does need to be addressed.

Mr. GOODLATTE. Mr. Watt.

Mr. WATT. Thank you, Mr. Chairman. I don't think I'll need the full 5 minutes.

I think I understand pretty clearly where Mr. Tobias and Mr. Simon are on this issue of honoraria. I'm having a little trouble being clear on where Mr. Thompson is, and I just want to clarify.

Do you take the position that a complete ban on honoraria to Federal employees is justified or not justified? I wasn't clear on where you—

Mr. THOMPSON. No, we support the honoraria ban to the extent that it involves an employment nexus.

Mr. WATT. I'm sorry?

Mr. THOMPSON. We support a ban on honoraria so long as there is an employment nexus; so long as it is not work-related, honoraria should be permissible.

And, incidentally, I would mention, we haven't talked much about what should happen in Congress. I know that Mr. Frank is a supporter, I believe—I hope I'm not mischaracterizing this—of permitting congressional staff as well to receive honoraria that's not work-related.

Mr. WATT. What's your position on that?

Mr. THOMPSON. Well, I would agree with that. I would suggest that it would be reasonable to look at and give Members discretion on how they would like to have their staff proceed. I don't think there's any reason to believe that Members cannot police their staff, cannot set policies that are in the public interest. Ultimately, the Member's name, good name, is what's at stake when their staff acts improperly.

Mr. WATT. But if you follow that policy all the way out, you get to a point where basically we wouldn't have any House rules; each

Member would be his own House and have his own rules, if you go all the way down that. So I want to be clear on——

Mr. THOMPSON. Well, of course——

Mr. WATT [continuing]. How far you are going on that.

Mr. THOMPSON. The analysis is limited, but I do think that there's much to commend in that analysis. Ultimately voters do serve as a pretty fair check and balance on the system. Members have a very powerful, built-in incentive for acting ethically and properly. And I think we have a news media that's been very diligent in assuring that ethical matters are properly raised. I think voters can be well enough informed to make judgments. So I think that the analysis of allowing Members to make judgments is a strong analysis, and I don't know exactly where it ends, but I think it certainly would be proper when it comes to overseeing their staff.

Mr. WATT. Well, I understand that, but let me just give you a slightly different perspective on it. Obviously, there are shades here, but if you follow that analogy all the way out, basically, then the only consequence a Member of Congress pays is the political consequence. There's no consequence beyond that. He loses his position, his or her position, in Congress, but there are no sanctions or things that go beyond that.

Mr. THOMPSON. But it depends on the nature of the conduct. Of course, we can imagine all kinds of conduct that's clearly a violation of the criminal code, and that's as well a pretty powerful incentive. So I don't know if I agree with that. As I say, there is the criminal code.

Mr. WATT. I think I'm clear on where he is in this. I appreciate it and yield back the balance of my time.

Mr. GOODLATTE. Thank you, Mr. Watt.

Mr. Hyde.

Mr. HYDE. Well, thank you. I want to thank the witnesses for very helpful testimony. This is a very difficult field. It is not simple. We think it is, but it isn't.

All of the reforms we've talked about—parenthetically, I'm reminded of a great sentence of Senator Roscoe Conklin around the turn of the century or before from New York, he said when Dr. Johnson said, "Patriotism is the last refuge of a scandal, he never considered the possibilities of the word reform."

The ability of the wealthy to purchase political office or to try to purchase political office really cannot be addressed—I don't know if it's something, a wrong or an evil to be corrected, but *Buckley v. Valeo* I think correctly said it's your money; you ought to be able to spend it the way you want, and if you want to spend it on an ego trip of national dimensions, running for the highest office in the land or Senator, as was done in California, go ahead. But it certainly unbalances the so-called level playing field that we all look for.

Contributions in kind are never adequately dealt with by these reform measures. Labor has a unique capability of providing terrific contributions in time and services to their candidates, which, unfortunately, the Chamber of Commerce wouldn't touch with a 10-foot pole. They're above that sort of thing, much to my regret.

But, nonetheless, the bodies that can be delivered to ring the doorbells, to man the phone banks, to register the voters, et cetera,

et cetera, et cetera, are wonderful; they're exercises in democracy. I wouldn't restrain them at all. I'd like to acquire some of them. But I'm just suggesting all the reforms never touch that.

And, lastly, the restrictions on spending always strike me as incumbent protection devices, because when you are a virtual unknown and you want to tackle the local icon, you need lots of money for name ID; you need lots of support. You need a major effort to overcome the built-in advantages incumbents have, and, I might add, ought to have, because if the incumbent's been around for a long time, they have paid their dues. But, again, it takes a lot of money.

Many times in putting caps on what people can spend you are harming a challenger, and I'm not sure that's the way to go, either. I have no answers. I simply discuss these things as troubling to me in this mine field we're in.

Mr. GOODLATTE. Thank you, Mr. Hyde.

Mr. Inglis.

Mr. INGLIS. I wonder if any of you would like to comment on—I was interested in what Chairman Hyde was talking about the *Buckley* case. Do you agree with that analysis? That analysis seems to be the conventional wisdom, and I don't have any means of really disputing it. I just wonder whether you agree with that analysis of the *Buckley* case. Do you have—

Mr. SIMON. Yes, I would like to answer that, and maybe I could respond to the three points Mr. Hyde alluded to.

Common Cause participated as a party in the *Buckley* case and argued in support of the constitutionality of all elements of the 1974 Reform Act. So insofar as the Court struck down expenditure limits, including limits on the spending of personal wealth, we had argued a contrary position. But I think it is now, and has been for the last 20 years, the accepted doctrine of the *Buckley* case that such spending by an individual on his own behalf cannot be restricted by Congress.

However, there are measures that Congress can take, we believe, that would address some of the problems that are caused by the wealthy candidate phenomenon. In the Smith/Shays/Meehan bill, H.R. 2566, the bipartisan bill that's in the House—and, as I said, there is a companion bill, the McCain/Feingold bill, in the Senate—candidates who agree to abide by voluntary spending limits receive alternative benefits. They receive in the Senate bill 30 minutes of free television time and then a 50-percent discount on additional TV time they purchase for their campaigns. In the House bill there is a 50-percent discount provided on television and radio time. That is an extremely valuable benefit, and it would help a candidate who is running against a wealthy opponent, and would provide resources to that candidate in order to deal with the infusion of personal wealth that his opponent is putting into the campaign.

So it's not a restriction on the personal wealth of one candidate, but it's a way to help opponents of the candidate, of a wealthy candidate, in order to deal with the problems that result.

Let me, if I may, just refer briefly to two other points Congressman Hyde mentioned. The issue of labor spending is really just a piece of a larger picture, and I think needs to be viewed in a larger context of internal communications that a whole range of organiza-

tions, both Republican and Democratic, both liberal and conservative organizations, make. There are many organizations that participate in the political process through communications to their membership, and I think the effect of labor spending needs to be viewed not in isolation, but in that larger context of activity that occurs across the political spectrum.

Mr. HYDE. Are you—excuse me, if I may, and I'm learning from what you say, but are you saying that that's pretty much even, that there are lots of groups that help, have made contributions in-kind for the Republicans?

Mr. SIMON. Congressman, I—

Mr. HYDE. Because it's my experience in 22 years in Congress and 8 years in the State legislature there is no comparison.

Mr. SIMON. Well, unfortunately, there's not a lot of hard disclosure information on this kind of activity by which you could gauge exactly the relative levels of spending, but I think we have seen over the last few years certainly increased political activity by right to life groups, by antigun control groups, and similar conservative organizations active in the political process, active with their membership. And I think, again, this kind of activity does occur across the political spectrum and is not imbalanced.

On the third point, about the effect of spending limits being essentially incumbent protection mechanisms, actually, I think quite the opposite is the case. Incumbents have the ability to raise far more money than challengers. Incumbents receive a vastly disproportionate share, for instance, of PAC contributions. And, typically, incumbents can amass much, much more in the way of resources than their challengers, and can, therefore, outspend their challengers.

By providing a system of voluntary spending limits, by providing benefits to induce or encourage candidates to agree to those spending limits, we really, I think, are giving challengers a chance to compete effectively with incumbents. And under the current system, I think, by and large, challengers don't have that ability.

Mr. HYDE. If I may, and I don't mean to be disorderly here—

Mr. GOODLATTE. Not at all, Mr. Chairman.

Mr. HYDE. Not quite, in my judgment. A long time incumbent has established a name identification that parity in raising money is not going to overcome. You're going to need much more than parity.

Let's pick Dan Rostenkowski, probably a poor example because of circumstances, but there's no way you're going to run against Dan, all things being equal, forget the other problem, in Chicago unless you can overcome 30-some years of favorable name identification in the community. That takes a lot of money.

Mr. THOMPSON. If I may, Mr. Simon mentioned the question of internal communications with members. The whole member issue, who is a member, was recently the subject of a lawsuit. As you may know, the Federal Election Commission had amended its regulations relating to who constitutes a member of an organization. That would have had a dramatic effect on a number of organizations. And the chamber of commerce and the American Medical Association actually sued alleging that they violated the first amendment.

In fact, they prevailed in that case, and those regulations were struck down.

Had they not been, I think the question of level playing field would clearly have been raised because, again, Mr. Simon mentioned that the labor activity is simply part and parcel of what is commonly occurring in a variety of organizations. It may be at this moment, but had those regulations not been enjoined, circumstances might have been quite different.

Mr. TOBIAS. Congressman Inglis, I would—

Mr. GOODLATTE. Mr. Tobias.

Mr. TOBIAS [continuing]. Certainly agree with what Congressman Hyde said, to the extent that whenever I hear the term "reform," I get very nervous, and I think that the reform that was instituted in 1989 is a perfect example. It swept with far too large a broom, and that's what led to the successful lawsuit and the declaration of unconstitutionality, of the statute.

Mr. HYDE. I'm going to agree with Mr. Simon about special interest groups like right to life and the gun people. They usually coalesce around an interest and are pretty bipartisan, as long as their interest is protected, which is a little different from organized labor going for primarily one particular party, but you do have a point.

Mr. GOODLATTE. Mr. Tobias, on—

Mr. WATT. You'd better leave that alone.

Mr. TOBIAS. Well, I don't know whether I'm going to leave it alone. I don't know that that's so true. I mean, I think that that might be a slight exaggeration. I think that the record will reflect, for example, that NTEU is a labor union and NTEU does support on a bipartisan basis.

Mr. GOODLATTE. Mr. Tobias, let me ask you—

Mr. HYDE. We won't press that too far. OK.

Mr. WATT. Mr. Chairman, I don't want to get into a give-and-take here, but—

Mr. GOODLATTE. Mr. Watt, let me ask a question; then we'll come back to you.

I'd like to get you to comment, Mr. Tobias, on the changes to H.R. 1639, to fix the honoraria ban, that you would propose be made to Mr. Frank's bill.

Mr. TOBIAS. I identified four or five changes in my testimony. Do you want me to identify them again or—

Mr. GOODLATTE. Yes, yes, please.

Mr. TOBIAS. Well, first, I suggested that the bill be positively framed rather than negatively; in other words, a narrow ban as opposed to a broad ban, with exceptions. Second, I think that the restrictions which limit the acceptance of compensation on work related compensation are redundant with existing regulations and statutes, and are unnecessary. And, I think that the language which limits compensation related "primarily to the responsibilities, policies, or programs of the agency or office in which the individual is employed," overbroad and vague.

Fourth, I think that the language which prohibits compensation where the reason is related to an employee's official duties is something which is impossible to enforce and impossible to understand.

Fifth, I think the issue of the \$2,000 cap is also—will fail constitutional scrutiny, because I believe that so long as the speech is unrelated to government employment, that there can be no limitation on that kind of speech. So long as there's no limitation on other kinds of outside employment, so long as the fee is usual and customary, I think that there should be no cap.

So those are the problems that I see with the legislation.

Mr. GOODLATTE. Thank you.

Mr. Watt.

Mr. WATT. Mr. Chairman, I don't have anymore questions. I did just—I couldn't resist the temptation to give Chairman Hyde a slightly different perspective. With economic security and jobs resonating in this political campaign the way it has, it surprises me that he is taking the position that that is not as clearly a distinct issue or a basis for supporting somebody as right-to-life or guns or—I mean, and the notion that anyone supports political candidates simply because they are one party or the other party, rather than making an evaluation of the things that they stand for and support, that they are interested in, I think is overstatement.

Mr. HYDE. Well, if I may agree with my friend, certainly—and Mr. Tobias—certainly there are Republicans that are supported by his union, and on occasions, strange as it may seem, I have received support from some union supporters, but pretty generally, and with justification, labor marches in the Democratic column, and generally their interests seem to them to be better protected by the Democrats, not isolated instances, but that's been the tradition, and I understand that.

It is a fact, though, that organized labor does a great job in providing contributions in kind to their candidates, which are generally Democratic. But it is not matched effectively on the other side of the spectrum—

Mr. WATT. I think it's beginning to be matched pretty effectively by the Christian right movement—

Mr. HYDE. They're kind of—they're pretty bipartisan.

Mr. WATT. Well, you say they coalesce around one issue. That issue is religious issues. But I will tell you, in my last interview with the newspaper, they asked me the question: "How did you get a zero rating on, or something close to a zero rating on, Christian issues?"

I said, "Look at the issues that they asked me about." They asked me about the balanced budget. They asked me about, you know, a whole range of issues that I don't know how in the world my position on line item veto reflects whether I'm a Christian or not. I mean, that's outrageous. Do you see what I'm saying?

Mr. HYDE. I always considered you—I've considered you a good Christian.

[Laughter.]

Mr. WATT. Well, I think I am, too, but I don't do very well on the things that they are rating me on. And, you know, I don't have any problem with them rating me on school prayer, for example; that clearly is a religious issue, and I happen to disagree with them on a constitutional basis, not because I don't believe in people praying. But when somebody gives me a zero rating on religious

basis and calls me a non-Christian because I voted against the line item veto, I say, give me a break.

Mr. HYDE. I don't think they'd call you a non-Christian; they'd just give you a low rating—

Mr. WATT. Well, but the implication is that somehow this Member of Congress is less worthy of Christian support because of this, and the implication then is you're a non-Christian, right?

And so the balance is beginning to take place, but internally in what you say, when you express surprise that occasionally you get support from labor, you are basically saying, hey, I may not be where labor would like for me to be on their issues.

Mr. HYDE. On all issues. I mean on every issue. I hope I'm there on some issues.

Mr. WATT. On some issues, yes. And you're beginning—you reflect that now by getting some support, but the notion is that they are just blindly marching down the road in support of Democrats, and I think that's untrue.

And I'm not suggesting that the Christian right is blindly supporting down the road, marching down the road of Republicans, but I do think they're going far afield of this single issue concept that you identified as a distinction.

Mr. HYDE. I don't disagree with you.

Mr. WATT. I yield back the balance of my time.

Mr. CANADY [presiding]. I thank the gentleman for yielding.

I apologize for missing all of your testimony. I know that—

Mr. WATT. We were just stalling until you got back anyway.

[Laughter.]

Mr. CANADY. Well, I know that, in particular, Mr. Frank has some questions which he wished to ask. Unfortunately, he is still in the Rules Committee or on his way back, although I think if he's on his way back, he will soon turn around because I think the bells are going to ring momentarily. I think we're going to have a vote on the House floor.

So I don't have any questions. Are there other members—is there any other Member that wishes to be recognized?

[No response.]

Mr. CANADY. I would ask that Mr. Frank be given the opportunity to submit any written questions to you for your response, and we'd appreciate your cooperation in responding to those.

Mr. TOBIAS. Thank you very much, Mr. Chairman.

Mr. THOMPSON. Mr. Canady, may I put today's editorial of the Washington Times in the record, please?

Mr. CANADY. Without objection, that will be included within the record.

[The information follows:]

Need extra cash? Call Justice

You may perhaps recall the huge 1989 flap over congressional pay and the ability of members of Congress (and, in some cases, other government employees) to supplement their income with fat honoraria from outside groups. The painful resolution of that dispute was a ban on honoraria in exchange for a substantial pay raise for Congress. But the honoraria ban extended well beyond Congress — in fact, to nearly all employees of the federal government. It was a reflection of the conclusion of a bipartisan ethics task force: "substantial outside earned income creates at least the appearance of impropriety and thereby undermines public confidence in the integrity of government officials."

Whatever one thinks of the "appearance of impropriety" rationale (as if lots of these folks didn't have trouble enough with actual impropriety) the law was the law — until the Supreme Court ruled, last year, that in the case of government employees below grade GS-16, it was an unconstitutional infringement of First Amendment rights. In effect, in cases where an employee was doing something entirely on his own time in an area that had nothing to do with his government duties, his First Amendment protection extended to his being able to accept a fee for writing an article or giving a speech, for example.

In *United States vs. Treasury Employees Union*, the Supreme Court specifically did not address the case of higher-ranking executive branch officials. What about them? As *The Washington Times'* Frank Murray recently reported, the decision fell to the Justice Department's Office of Legal Counsel, headed by Assistant Attorney General Walter Dellinger. And in a remarkable memorandum opinion issued Feb. 26, Mr. Dellinger sweepingly extended the Supreme Court's ruling, tossing out the ban for all government employees — including the political appointees of the Clinton administration.

Mr. Dellinger argues that given the Supreme Court's reasoning in ruling as it did for lower-level employees, nothing can remain of the statute Congress enacted. The Supreme Court found a First Amendment violation of plaintiffs' rights in the case before it, and it would be inappropriate for either the court (which didn't) or the Justice Department (which wouldn't) to, in effect, redraft the statute to cover only higher-ups. "Nothing in the text or the legislative history of the honoraria ban indicates Congress was will-

ing to limit the ban to high-level executive branch officials and legislative and judicial branch employees," Mr. Dellinger opines. Moreover, maintaining the ban on the higher-ups would result in its application to a class much smaller than Congress intended — such that, in Mr. Dellinger's view, the more limited ban would not be "traceable to congressional intent." Given the seriousness of the First Amendment implications, moreover, Mr. Dellinger is especially reluctant to devise a reading of the statute that would leave restrictions on speech in place.

Not to put too fine a point on it, Mr. Dellinger's office has here taken leave of its senses. Courts not infrequently strike down a particular provision of a statute. That doesn't mean you throw the whole thing out, however. If possible, you sever the offending passage and the rest stands. Many laws (though not the one in question) have explicit "severability" clauses. Even ones that don't, by ample court precedent, can be construed as if they do.

Congress clearly wanted honoraria banned. The Supreme Court said no in the case of a particular class of people — but only in that case. In fact, the court said that though the ban was "crudely crafted" in its application to all employees, "the Government conceivably might advance a different justification for an honoraria ban limited to more senior officials, thus presenting a different constitutional question than the one we decide today."

The strange thing is that Mr. Dellinger quotes this very passage in his opinion. His response to the invitation from the court was to slam the door. Instead of trying to save as much of the statute as possible — and one might reasonably expect a measure of deference to the legislature from someone in Mr. Dellinger's office, whose responsibility is, after all, to tell the government what the law is — he goes out of his way to blow the rest of Congress' work up, in the name of deference to the legislature. One might be forgiven for thinking that Congress would be especially concerned about the appearance of impropriety in senior officials — the people who actually make policy.

It's outrageous. Mr. Clinton can start fixing this, and he ought to, by issuing an executive order to his political appointees telling them to comply with the ban. If ever anything made it look like the fix was in in Washington — we'll jack up our pay, ban honoraria, and let the courts throw the ban out, heh-heh-heh — this is it.

Mr. CANADY. Again, we thank you for being with us today. We will look forward to working with you on this issue. It's my hope that we can move forward with some legislation in this area, and we will certainly look forward to receiving your thoughts as we address the issue.

Mr. TOBIAS. Thank you.

Mr. SIMON. Thank you.

Mr. THOMPSON. Thank you.

Mr. CANADY. Thank you very much.

The subcommittee is adjourned.

[Whereupon, at 11:36 a.m., the subcommittee adjourned.]

BOSTON PUBLIC LIBRARY



3 9999 05984 024 7

ISBN 0-16-052787-2



9 780160 527876

90000

